Supreme Court, U.S.
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No. 04-1084

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court abused its discretion by entering a preliminary injunction under the Religious Freedom Restoration Act after finding the government defendants had failed to demonstrate any compelling interest in enforcing the Controlled Substances Act against respondents' sacramental use of *hoasca*.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6, Respondent O Centro Espirita Beneficiente Uniao do Vegetal states that it is a nonprofit corporation under the laws of New Mexico, has tax exempt status pursuant to 26 U.S.C. § 501(c)(3), and is recognized as a church under 26 U.S.C. §§ 509(a)(1) and 170(b)(1)(A)(i).

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MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The government defendants (government) omitted the district court's Memorandum Opinion and Order denying the government's motion to stay the preliminary injunction. App. 1-8. It is significant because it further explains the district court's conclusion that the 1971 Convention on Psychotropic Substances (Convention) does not apply to *hoasca.*

INTRODUCTION

After holding a lengthy evidentiary hearing, the district court preliminarily enjoined the government from interfering with UDV's sacramental use of *hoasca.* The district court did not hold that the Religious Freedom Restoration Act (RFRA) required this result. Rather, the district court held *only* that, *in this case, at this preliminary stage,* the government had failed to prove, as RFRA requires, that it has a compelling interest in criminalizing UDV's religious practice. The court of appeals affirmed twice, holding *only* that the district court did not abuse its discretion, in light of RFRA's mandate and the evidentiary record developed thus far. Therefore, the government's statement of the question presented–in which the government asks rhetorically whether RFRA intrinsically "requires" the result in this case–is incorrect.[1]

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[1] The government's statement of the question presented assumes that *hoasca* is unsafe for use even under medical supervision. The district court took testimony on this contention and rejected it. It also incorrectly treats as a given that the importation of *hoasca* would violate the Convention, and that Congress has found the substance at issue to be unsafe. Neither assumption is justified.

Because the district court and the court of appeals faithfully applied RFRA to the evidence in this case, because the district court's factual determinations and the court of appeals' review are entitled to deference, and because nothing in the decisions below militates in favor of an interlocutory writ of certiorari, this Court should deny the petition.

STATEMENT OF THE CASE

The government's statement of the case does not fairly summarize the facts. It includes fragments of evidence the district court found unpersuasive and omits the extensive lay and expert testimony–including the government's own–that showed UDV's sacramental use of *hoasca* causes no harm and is not likely to be diverted to non-religious use. It ignores the district court's detailed analysis of the conflicting evidence and the basis for its finding that the government has thus far failed to demonstrate the compelling interest RFRA requires. 227a, 236a, 243a. The government's statement of the case also affirmatively misstates evidence, as explained below.

Respondents are a Christian religious organization and several of its members, including its leadership (collectively UDV). UDV is the small American branch of a religion founded many years ago in Brazil and which the Brazilian government officially recognizes and exempts from its controlled substances laws. G/App. 176; S/App. 1598, 1600-03.[2] The American branch has some 130 American and Brazilian members. S/App. 676-77. UDV is well known in Brazil for its beneficial effects on the lives of its adherents and its extensive charitable activities. S/App. 1592.

A central and essential element of the UDV religion is its sacramental use of *hoasca,* an herbal tea that, under the

[2] "S/App." and "G/App." refer to the appendices filed in the Tenth Circuit.

church's doctrine, must be made ritually from two plants that grow in the Amazon rain forest, *banisteriopsis caapi* and *psychotria viridis.* 180a. The tea, which UDV imported from Brazil for many years, contains a small amount of naturally-occurring dimethyltryptamine (DMT). The members of the UDV believe that *hoasca* is sacred, and that their sacramental use of *hoasca* connects them to God. S/App. 1599.

After the government seized the UDV's sacramental *hoasca* and threatened prosecution, UDV filed suit.[3] In response to UDV's motion for a preliminary injunction, the government alleged that its prohibition of UDV's exercise of religion served three compelling interests: (1) protecting the health and safety of UDV's members; (2) preventing diversion of *hoasca* to non-religious use, and; (3) adhering to the Convention. S/App. 814-29.

The parties submitted conflicting expert and lay declarations addressing the government's claimed compelling interests. The government did not claim below, as it now does, that the district court should not take any evidence, but should instead consider itself bound by pre-RFRA decisions against persons claiming their habitual use of marijuana was religious, and by the supposed finding Congress made regarding the dangers of *hoasca* when it placed DMT on Schedule I of the CSA.[4]

[3] The government states that UDV imported *hoasca* surreptitiously. Pet. 5. But one set of shipping notices described the tea as "HOASCA," S/App. 658-662, and others described it as "Chacrona and Mariri," the common names of the plants in *hoasca,* to which a DEA witness admitted familiarity. S/App. 1712. Further, shipping forms stating that the tea contained DMT would have contravened DEA's regulation forbidding shipping containers to indicate the presence of controlled substances. *See* 21 C.F.R. § 1301.74(e).

[4] The legislative history of the initial scheduling of DMT in 1970 shows that the government was concerned with synthetic DMT, not with DMT found endogenously in plants. *See* Drug Abuse Control Amendments of 1968,

After considering the parties' conflicting declarations and memoranda, the district court scheduled an evidentiary hearing on UDV's motion for preliminary injunction and took evidence from twenty witnesses, including ten experts,[5] on three issues: health and safety, risk of diversion, and UDV's contention that it and the Native American Church (NAC) are similarly situated for purposes of equal protection. S/App. 809.

The district court's lengthy and detailed opinion summarizes its view of the evidence and its findings. 177a-246a. The court denied relief under the First Amendment and the Equal Protection Clause. 179a, 183a-197a, 246a. With respect to UDV's RFRA claim, however, the court found:

> The Government has not shown that applying the CSA's prohibition on DMT to the UDV's use of *hoasca* furthers a compelling interest. This Court cannot find, based on the evidence presented by the parties, that the Government has proven that *hoasca* poses a serious health risk to the members of the UDV in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to consume *hoasca* would lead to significant diversion of the substance to non-religious use.

212-13a. The district court also found that the Convention "does not apply to the hoasca tea used by the UDV." 242a. The court did not purport to finally resolve the parties' various factual disputes, but held that thus far, whatever its weight, the evidence as to health risks was, "essentially, in equipoise." 227a. The court made clear that its decision was preliminary and that it expected to hold a final merits hearing at a later date. 183a. Because the government had not demonstrated a compelling interest, the district court did not reach the"least restrictive means" prong of the RFRA test. 243a.

The parties and the district court then conferred at length regarding the form of the injunction. Although the government now complains that the injunction "imposed elaborate procedures," pet. 8, the government insisted that if UDV were to be permitted to import, store and distribute *hoasca* during its religious services, it should be required to comply with all the regulations covering the commercial importation of controlled substances.[6] UDV agreed to comply with reasonable regulatory requirements. The preliminary injunction permitted UDV and its members to exercise their religion, but accommodated the government's interest relating to shipping and storage controls. The evidence will show that UDV's importation and use of *hoasca* under the injunction has been uneventful.

The district court then denied the government's motion to stay the preliminary injunction, explaining its reasoning carefully. App. 1-8. The government obtained an emergency stay from a two-judge panel of the Tenth Circuit–which ruled

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Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 90th Cong. 68, 76 (1968).

[5] The government argues that the testimony of UDV's "hired"expert witnesses is unworthy of belief. Pet. 13, 16. That suggestion is insulting to the district court, which credited their testimony, and to the eminent experts: Dr. David Nichols, Professor of Medicinal Chemistry and Molecular Pharmacology at Purdue University; Dr. Mark Kleiman, Professor of Policy Studies at the University of California and former Director of the Office of Policy and Management Analysis of the Criminal Division of the DOJ; Dr. Charles Grob, Professor of Psychiatry at the UCLA School of Medicine and Director of the Division of Child and Adolescent Psychiatry at Harbor-UCLA Medical Center.

[6] It is notable, however, that the government does not impose such controls on the transportation, storage and distribution of peyote by members of the NAC.

without benefit of the record and which consisted of two of the dissenters in the later *en banc* rehearing. 168a-174a.

A panel of the court of appeals, in a 2-1 decision, held that the district court had correctly decided the case under RFRA and affirmed the district court's preliminary injunction. 121a-167a. The Tenth Circuit granted the government's motion for rehearing *en banc* "to review the different standards by which [the Tenth Circuit] evaluates the grant of preliminary injunctions, and to decide how those standards should be applied in this case." 2a-3a.

The *en banc* court split on various grounds relating to generic preliminary injunction standards, but an 8-5 majority held that, whatever the applicable standard, the district court had not abused its discretion in granting the preliminary injunction to the UDV under RFRA. 3a. The government sought stays of the mandate pending review on certiorari, but the Tenth Circuit and this Court denied the requests to stay the mandate.

After the mandate took effect, UDV resumed its religious practices and requested that the district court proceed to try the merits. The government has opposed any further activity in the district court until this Court acts on the government's petition.[7] App. 40-46.

In addition to unfairly summarizing the evidence and ignoring all contradictory evidence, which the lower courts fully analyzed in their opinions, the government has misstated important facts and evidence:

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[7] Before the court of appeals and in its emergency application to this Court for a stay, the government complained that the district court had entered an unprecedented preliminary injunction on an incomplete record. Now, in an effort to make this case a candidate for certiorari, the government has done an about-face, arguing that this Court should ignore that the merits hearing is yet to be held and, instead, treat the record as complete. Pet. 24, 25.

1. The government misuses the House and Senate reports on RFRA to buttress its claim that Congress intended that post-RFRA courts must implement the results in pre-RFRA decisions involving other controlled substances. Pet. 16. But the authors of the House Report on which the government relies anticipated and rejected the government's argument here:

> [B]y enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is *not* a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened[.]

H.R. Rep. No. 103-88, at 5 (1993) (emphasis added); *see* S. Rep. No. 103-111, at 8 (1993).

2. The government falsely states that no DEA exemption for peyote predated RFRA. Pet. 26 n.3. The FDA exempted religious use of peyote in 1966. *See* 21 C.F.R. § 1307.31 ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church . . ."). This exemption remains in force. S/App. 1425-28.

3. In an attempt to alarm the Court, the government makes six misrepresentations about UDV's sacramental tea, including three false attributions to the district court. First, contrary to the government's statement, the district court did not find "that it is just as likely as not that *hoasca* will be diverted to the general public and that members of UDV will suffer harm from the consumption of hoasca." Pet. 12. The quote is from a dissenting judge's unfair characterization of the

district judge's conclusion that the government had not met its RFRA burden. The district judge did not write it.

Second, the district court never found that *hoasca* causes "permanent psychoses," pet. 27, nor was there any such evidence.

Third, the district court did not "recognize" that the injunction will cause members of the UDV to "put their physical and psychic well-being in serious jeopardy." Pet. 18. What the district court acknowledged was "that the Government has presented a great deal of evidence *suggesting* that hoasca *may* pose health risks to UDV members." 244a (emphasis added). The district court also noted the results of a preliminary study that found "there had been no injurious effects caused by [UDV members'] use of ayahuasca,"[8] 213a, and that "Government expert Dr. Genser stated. . . that he would be more troubled by a person drinking grapefruit juice while taking a contraindicated drug than by a UDV member taking hoasca in a ceremonial context." 223a.

Fourth, although the government claims that *hoasca* is "DMT-laden," pet. 3, the uncontroverted evidence is that "a typical dose of *hoasca* (200 mL) would contain 25 mg of DMT." Ex. 24. This means that *hoasca* is only 12 ten-thousandths of 1% DMT, and that a sixty-liter container of tea, like the one the government confiscated, would contain no more than one heaping teaspoon of DMT.

Fifth, without reference to the record, the government repeatedly refers to DMT as a narcotic. Pet. 23, 25. DMT is not a narcotic. It is classified as an hallucinogen, although the evidence was that actual hallucinations are rare and do not occur in the religious context. Tr. 1285-87 (Oct. 30, 2001).

Sixth, the government falsely claims that unless *hoasca* is imported, those who might desire to take DMT will be

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[8] *Ayahuasca* is the Spanish word for the *hoasca* tea.

unable to find it in the United States. Pet. 26. However, DMT is readily available in this country from many sources, including grasses the government recommends for the control of roadside erosion. 195a. The chemicals necessary to prepare synthetic DMT, which *hoasca* does not contain, are also readily available in the United States. Ex. 24.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT'S INTERLOCUTORY DECISION IS NOT RIPE FOR REVIEW.

The Court should deny the petition because the Tenth Circuit's interlocutory decision only affirmed a preliminary injunction and remanded the case to the district court for a trial on the merits. Absent extraordinary circumstances, the interlocutory status of a case is sufficient to justify denial of a petition for certiorari. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of petition) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying petition as "not yet ripe for review" because circuit court remanded case to district after resolving various legal issues); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (concluding that the order "sought to be reviewed by certiorari . . . was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application"); *Am. Constr. Co. v. Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372, 384 (1893) (holding that certiorari to review unavailable for interlocutory decisions except to "prevent extraordinary inconvenience and embarrassment in the conduct of the cause"). Contrary to the government's

arguments, pet. 24-29, this case does not involve extraordinary circumstances that warrant certiorari review.

First, the record does not support the government's alarmist arguments that denial of the petition will result in physical or psychological harm to members of the UDV and diversion of *hoasca* for non-religious use. Pet. 27-29. Such arguments failed to convince the district court, a panel of the court of appeals, the court of appeals sitting *en banc*, and this Court when it refused to stay the preliminary injunction. Regardless of how often the government makes these arguments and misrepresents the record to support them, no evidence exists that anyone will suffer any harm if the 130 U.S. members of the UDV continue sacramental use of *hoasca* until the district court makes a final decision. S/App. 676-77.

Second, contrary to the government's assertion, the Tenth Circuit's decision affirming the entry of the preliminary injunction does not "rest[] solely on a premise as to the applicable rule of law." *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The government relies exclusively on cases in which the Court reviewed interlocutory decisions that presented legal issues of national importance. *See Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (reviewing interlocutory decision preliminarily enjoining enforcement of federal statute lower court concluded was likely unconstitutional on its face); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (reviewing interlocutory decision enjoining enforcement of federal statute based on common law defense of debatable validity); *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) (reviewing interlocutory decision enjoining enforcement of federal statute lower court concluded was likely unconstitutional on its face); *Saenz v. Roe*, 526 U.S. 489 (1999) (reviewing clearly erroneous interlocutory decision enjoining implementation of state welfare statute lower court concluded

was unconstitutional on its face); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam) (reviewing interlocutory decision enjoining state from implementing its statute and threatening to enjoin six other states from implementing similar statutes). But this case does not present legal issues with widespread ramifications. The parties do not dispute that RFRA's legal standards control. The pivotal issue here is whether the Tenth Circuit *correctly applied* those indisputable legal standards to *this* unique and incomplete record. Because the Tenth Circuit's fact-specific, interlocutory decision affects only the parties and only does so temporarily, its decision does not merit certiorari review. *See Hamilton-Brown Shoe Co.*, 240 U.S. at 258 (denying petition seeking review of interlocutory decision that was "important to the parties," but "involved no question of public interest and general importance").

Third, certiorari review is not "fundamental to the further conduct of the case," *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945), because RFRA is not challenged here. Unlike *General Motors*, where the issue involved a Takings Clause issue about which the circuit courts were divided, this case only raises questions about the proper application of established *statutory* legal standards to particular facts. In cases like this one, although certiorari review might have *some* impact on remand, it is unnecessary to grant the petition because that impact would not be "fundamental." *Id.*; *see also Thornburgh*, 476 U.S. at 757 n.8 (concluding that Court should deny petition when "the probability of success on the merits depends on facts that are likely to emerge at trial"). To conclude otherwise would transform nearly every interlocutory decision into an "extraordinary" one. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

Fourth, like most interlocutory decisions, the decision below rests on a record that is inadequate for certiorari review. Unlike *Saenz* and *Thornburgh*, the record in this case is incomplete because factual disputes remain for the district court

to resolve at trial. *See Saenz*, 526 U.S. at 496-97 (noting that the state "did not challenge plaintiffs' evidence" and "relied squarely on [an] undisputed fact"); *Thornburgh*, 476 U.S. at 792 (noting "a full record . . . on the issues" presented). Here, the district court has made no final findings, only preliminary ones for the purpose of ruling on UDV's motion for temporary injunctive relief. 183a. Because the government failed to prove any compelling interest at the motion hearing, the district court has not made any findings with respect to the least restrictive means prong of the RFRA test. 243a. Under these circumstances, the Court should deny the petition.

II. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER FEDERAL DECISION.

According to the government, the Tenth Circuit's decision conflicts with holdings of other circuit courts that addressed "similar religion-based claims for exemptions from the Controlled Substances Act." Pet. 13-14. No such conflict exists. None of the cases on which the government relies is factually similar in any material respect to this case and, whether pre- or post-RFRA, the legal standards they apply are no different than those applied in this case. Each involved different controlled substances, in entirely different contexts, and their outcomes were fact-driven, just as this one is.

For example, *United States v. Israel*, 317 F.3d 768, 769, 772 (7th Cir. 2003), a post-RFRA case, involved a parolee forbidden to use controlled substances, required to hold a job and support his children. As a "Rastafarian," he claimed the right to smoke marijuana "every day all day" and, as a result, could neither hold a job nor support his children. *Id.* at 770. Similarly, in *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989) (Ginsburg, J.), the Court agreed that there should be no religious exemption for marijuana "smoked continually all day"

by members of the Ethiopian Zion Coptic Church and, significantly, distinguished the use of peyote in a controlled religious setting (which is akin to UDV's use of *hoasca*). *Olsen* fully supported the decision below.

The remaining cases the government cites, pet. 13-14, are similarly irrelevant to the lower courts' holdings in this case. They also involved frivolous attempts to throw a mantle of religion over unrestricted marijuana use or drug trafficking.[9] But even if their facts could be said to bring them close to this case, they would be of limited relevance because RFRA, on its face, *requires* individualized inquiry. *See* 42 U.S.C. 2000bb-1(b) (stating that government may "substantially burden" religious exercise "only if it demonstrates that application of the burden *to the person*" furthers a compelling interest) (emphasis added). Here, the government has stipulated that UDV's religion is *bona fide* and its members' beliefs sincere. Comparing UDV with defendants in criminal drug-trafficking cases who raised frivolous free exercise claims is unfair and unjustified. It is undisputed that UDV's members are law-abiding citizens. S/App. 686.

Both the district court and the Tenth Circuit correctly rejected the argument that the decisions the government cites comprise a body of contrary case law. 140a. ("The district court correctly distinguished, on two grounds, cases cited by the Government denying individuals' free exercise challenges to drug laws. First, the sincerity of the Uniao do Vegetal's faith and the substantial burden the CSA imposes on the practice of

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[9] *See United States v. Brown*, 1995 U.S. App. LEXIS 34750 (8th Cir. Dec. 12, 1995) (per curiam) (unpublished); *United States v. Greene*, 892 F.2d 453 (6th Cir. 1989); *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986) (per curiam); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971) (per curiam).

the religion are uncontested. By contrast, Courts in the other RFRA cases cited by the Government have found the plaintiffs' beliefs are not religious, are not sincerely held, or are not substantially burdened by governmental action.");149a ("As the D.C. Circuit observed in acknowledging the legality of the Native American Church's use of peyote but refusing to grant a religious exemption to marijuana, Uniao do Vegetal's use of *hoasca* occurs in a 'traditional, precisely circumscribed ritual' where the drug 'itself is an object of worship' and using the sacrament outside the religious context is a sacrilege." (quoting *Olsen*, 878 F.2d at 1464 (Ginsburg, J.)). The Tenth Circuit emphasized that its ruling

> in no way calls into question cases refusing to grant an exemption from the CSA for Marijuana, LSD, Heroin or any other controlled substances. UDV's position is distinct and as RFRA requires we have looked at the specific circumstances of Uniao Do Vegetal's ceremonial *hoasca* use and assessed the Government's asserted compelling interests. While we need not consider the CSA in a vacuum, the bald assertion of a torrent of religious exemptions does not satisfy the Government's RFRA burden. Moreover, we leave open the possibility that future evidence of the health effects and diversion potential may allow the Government to prove a compelling interest in enforcing of the CSA against *hoasca's* sacramental use.

152a-153a.

In short, the differences in outcomes of those cases and this case are fact-specific, and none reflects even trivial differences in the legal standards applied. Accordingly, there is no conflict among the circuits. *See Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931) (dismissing writ of certiorari

as "improvidently granted" where it appeared "that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law").

Finally, it is significant that in its effort to focus this Court on other courts' treatment of other substances in other contexts involving frivolous claims for religious exemptions from the CSA, the government assiduously avoids the NAC's officially-approved sacramental use of peyote, also a Schedule I controlled substance. The government has never attempted to explain how it can ask the courts to ignore the NAC's possession, distribution and ritual use of peyote while claiming that UDV's similar use of *hoasca* must be conclusively presumed to be a menace to society and to UDV's members, simply because it (like peyote) is on Schedule I of the CSA.[10] *Cf. Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 747 (1994) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) ("[N]ot every religion uses peyote in its services, but we have suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, without any suggestion that some 'up front' legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The record is clear that the necessary guarantee can and will be provided, after the fact, *by the courts*."(Citations omitted; emphasis in original.)).

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[10] The exemption in the CSA, 21 C.F.R. § 1307.31, and the more recent exemption through American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996a (2000), both permit pregnant women and children to consume peyote. S/App. 1471-2, 1714, 1245.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION.

The Court should deny the petition because the lower courts correctly applied RFRA to the unique facts of this case. In its petition, the government fails to identify and address the legal standards that apply to an appeal of a preliminary injunction issued under RFRA. Those standards illuminate the correctness of the decisions by the lower courts. If there were any error below, it was on the part of the seven judges of the court of appeals who held that UDV's application for preliminary relief must meet a higher standard than RFRA permits. Because this was to the government's advantage, it does not support the government's petition.

The grant or denial of a preliminary injunction is reviewed for an abuse of discretion. *Ashcroft*, 124 S. Ct. at 2790. A district court abuses its discretion in granting a preliminary injunction if it applies an incorrect legal standard or its preliminary fact findings are clearly erroneous. *Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 645 (10th Cir. 2004); *see also United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 508 (1974) ("The findings and conclusions of the District Court are . . . governed by the 'clearly erroneous' standard of Fed. R. Civ. P. 52 (a)" in the Supreme Court.)

The government, however, fails to confront the evidence below and explain why the district court's findings are "clearly erroneous." This is likely due to this Court's traditional reluctance to re-examine a factual record that two lower courts have addressed. Under the "two-court rule," this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949); *see United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (refusing to

revisit district court's factual finding after appellate court concluded that the record supported it because of "traditional deference" to the two-court rule). The rule applies here.

The government's attack on the evidence is largely limited to its complaint that if the evidence was "in equipoise" as the district court found, then the government should have won. Pet. 20-21. This is incorrect. The district court found that the government failed to carry its burden. When evidence is "evenly balanced," the party with the burden of proof "must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Colleries Dir.*, 512 U.S. 267, 281 (1994). Even if the UDV were to concede (which it does not) that the district court's finding of "equipoise" means that the government almost proved a compelling interest (which it did not), the government would still have no basis for the writ. In *Ashcroft*, 124 S. Ct. at 2791, this Court, applying strict scrutiny, addressed the proper appellate treatment of a preliminary injunction and held that, even where the "question is close," this Court "should uphold the [preliminary] injunction and remand for trial on the merits."

The district court's faithful adherence to RFRA is reflected in its extensive and careful analysis of the evidence, which consumes twenty-nine pages of the government's appendix, 207a-236a, and was based on thousands of pages of transcripts and exhibits. It applied RFRA to the evidence and its findings of fact just as the text of RFRA requires.

Accordingly, as the district court recognized and as the Tenth Circuit held some years ago, once a plaintiff shows by a preponderance of the evidence that the government has substantially burdened the plaintiff's sincere exercise of religion (as UDV established by stipulation), "the burden shifts to the government to demonstrate that the challenged regulation furthers a compelling [governmental] interest in the least restrictive manner." 207a (citing *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996)). This Court recently held the same, in the analogous circumstance of an appeal from a

preliminary injunction that blocked enforcement of an anti-pornography statute: "As the Government bears the burden of proof on the ultimate question of [the statute's] constitutionality, respondents must be deemed likely to prevail," unless the Government carries its burden. *Ashcroft*, 124 S. Ct. at 2791-2792. Under RFRA, the government's burden is a heavy one. *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (noting that compelling interest test is "the most demanding test known to constitutional law").

The district court methodically considered the evidence and applied it to RFRA's standards. 205a-245a. Below, as here, the government argued that Congress's inclusion of DMT on Schedule I of the CSA was sufficient proof of a compelling interest. 211a. After stating that it would not ignore Congress's inclusion of DMT on Schedule I, the district court nevertheless pointed out that RFRA "mandated that a court may not limit its inquiry to [Congress's] general observations[.]" 211a. Rather, under RFRA, "a court is to consider whether the '*application* of the burden' to the claimant 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'" 211a-12a. As Judge McConnell explained, "Congress' general conclusion that DMT is dangerous in the abstract does not establish that the government has a compelling interest in prohibiting the consumption of hoasca under the conditions presented in this case." 95a.

Moreover, the government insists that Congress found that DMT had a high potential for abuse, but Congress did not. Nor is the government correct that UDV's remedy is to seek rescheduling. Pet. 3. The DEA characterizes Schedule I as essentially a catch-all:

> [W]hen it comes to a drug that is currently listed in schedule I, if it is undisputed that such drug has no currently accepted medical use. . . and a lack of accepted safety for use under medical supervision, and

> it is further undisputed that the drug has at least *some* potential for abuse sufficient to warrant control under the CSA, the drug must remain in schedule I.

Notice of Denial of Petition, 66 Fed. Reg. 20038, 20039 (2001) (emphasis added). Therefore, a petition to reschedule DMT based on low abuse potential and safety for supervised use would get nowhere. And RFRA provides that a person whose religion is burdened by a law is to seek relief in a federal court, not administrative agencies or Congress. *See* 42 U.S.C. 2000bb-1(c). Peyote and mescaline are Schedule I drugs, but neither has been reclassified even though both have been considered safe for religious use since at least 1966. *See* 21 C.F.R. § 1307.31; 42 U.S.C. § 1996a.

The government also argued below, as it argues here, that the district court should have dispensed with RFRA's facial requirement of individual consideration of free exercise claims and simply followed the decisions of other federal courts that concluded there should be no religious exemption for marijuana, which is also on Schedule I. The results in those cases cannot supply the missing evidence here, where the government failed to show that UDV's members are harmed by *hoasca*, that society is harmed by their sacramental use of *hoasca*, and where no evidence exists that any of UDV's members are anything but upright, law-abiding citizens who simply wish to practice the religion they believe brings them closer to God.

The government's position seems to be that general congressional findings regarding the harmfulness of drug abuse are sufficient to prove a compelling interest. But Congress made RFRA apply to "all Federal law" and the implementation of that law, "whether statutory or otherwise," 42 U.S.C. 2000bb-3(a), and Congress passed RFRA to legislatively reverse this Court's holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which involved the sacramental use of Schedule I controlled substances. Moreover, the DEA (and

before it, the FDA), adopted regulations exempting the religious use of peyote, a Schedule I controlled substance, by the NAC. *See* 21 C.F.R. § 1307.31. Congress more recently passed the AIRFA, 42 U.S.C. § 1996a, which precludes state and federal governments from interfering with NAC's sacramental use of peyote. Thus it is not correct to argue that Congress considered its placement of a substance on Schedule I to be conclusive of its dangers in religious contexts. Pet. 17. In addition, in passing RFRA, Congress required courts to look behind general legislative findings to determine whether the application of a particular law to the particular person is justified by a compelling interest. *See* 42 U.S.C. 2000bb-1(b).[11]

After its careful analysis of the evidence, the district court found:

> The Government has not shown that applying the CSA's prohibition on DMT to the UDV's use of hoasca furthers a compelling interest. This Court cannot find, based on the evidence presented by the parties, that the Government has proven that hoasca poses a serious

[11] The government's reliance on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) [*Turner I*] and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) [*Turner II*] is entirely misplaced. Both involved First Amendment challenges to the facial validity of federal "must-carry" provisions that apply to cable providers. Applying *intermediate scrutiny*–rather than the strict scrutiny Congress has prescribed under RFRA–the Court afforded some deference to the *general* predictive judgments Congress made to justify the need for the must-carry provisions, but not to any specific legislative findings about application of those provisions to a specific cable carrier. Although *Turner I* and *Turner II* might require a court ruling on a facial challenge to the CSA to give significant deference to Congress's findings about the societal problems associated with drugs, they would not require a court to defer to Congress when determining whether the government has demonstrated a compelling interest in burdening a particular religious group's conduct. On the contrary, RFRA *requires* a searching, fact-specific inquiry, and Congress has made no specific findings about the need to criminalize the sacramental *hoasca* use at issue.

> health risk to the members of the UDV in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to consume hoasca would lead to significant diversion of the substance to non-religious use.

212-13a. While the government quarrels with the district court's findings, and complains that the district court and court of appeals should have deferred to the scheduling of DMT as a controlled substance, there is no doubt that the record supports the foregoing finding, and that the district court was correct, under both RFRA *and* under this Court's pre-*Smith* decisions, whose legal standards Congress incorporated in RFRA. *See* 42 U.S.C. 2000bb(b)(1).

The government's insistence on deference to legislative findings is contrary not only to the text and legislative history of RFRA, but to decisions of this Court, which has repeatedly explained that:

> Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.
>
> . . .
>
> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978); *accord Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *FCC v. League of Women*

Voters of California, 468 U.S. 364, 388 n.18 (1984). In *Landmark Communications*, 434 U.S. at 844, the Court held that it was therefore "incumbent" on the state appellate court "to go behind the legislative determination and examine for itself" the particular facts of the controversy before it, just as the Tenth Circuit did here, and just as RFRA requires.[12]

As *amici*[13] eloquently argued below, the government's arguments must be rejected if RFRA is to have any meaning:

> In entering a preliminary injunction in favor of the UDV in this case, the district court faithfully followed the dictates of RFRA, guided by the statute's text, its purposes and background, and the clear precedents of this Court. The government's arguments on appeal, if accepted, would seriously undercut RFRA's purpose of protecting the religious conscience of all faiths.

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[12] The government focuses its argument on the voices of the Tenth Circuit's dissenting judges. The reason the Court of Appeals reheard this case *en banc*, however, was principally because of the Tenth Circuit's own view–not shared by other circuits, as explained in Judge Seymour's opinion, 56a–that a party moving for a preliminary injunction that "disturbs the status quo" should bear a heightened burden. A bare majority of the court held that an application for a preliminary injunction that would disturb the status quo should be "more closely scrutinized to assure that the exigencies of the case" support its issuance. 13a. This heightened standard is difficult to square with RFRA, except as to a plaintiff's prima facie case. It is also difficult to square with *Ashcroft*, 124 S. Ct. at 2794, in which this Court assigned the government the burden of proving its justification for a restriction on speech. Whatever the merits of the Tenth Circuit's internal debate, it redounded to the benefit of the government, not UDV, and it is no basis for granting the petition.

[13] *Amici* included the Christian Legal Society, the National Association of Evangelicals, Clifton Kirkpatrick, as the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) and the Queens Federation of Churches, collectively representing millions of Christian Americans.

App. 9-36.

IV. THE PRELIMINARY INJUNCTION DOES NOT COMPEL THE GOVERNMENT TO VIOLATE THE 1971 CONVENTION.

The government asserts that the preliminary injunction requires it to violate the Convention. Pet. 13, 21-24. The government is wrong because (1) the district court correctly found that the Convention does not apply to *hoasca*; (2) even if the Convention does apply to *hoasca*, the government has not carried its burden under RFRA of establishing a compelling interest in enforcing it against UDV; and (3) even if the Convention otherwise applied, the language of the Convention and other treaties permits the government to accommodate UDV's religion.

Although the district court did not include compliance with the Convention as one of the issues on which it would take evidence at the hearing, the court considered some evidence that had either been attached to pleadings, referenced within them, or presented at the hearing for other purposes. This evidence included a declaration from Robert Dalton, an Assistant Legal Advisor for Treaty Affairs at the State Department, some of the Convention's legislative history where discussion was had that peyote, as a plant, was not covered but might be in the future, 239a-240a; the Official Commentaries to the Convention, App. 53-59; the Official Commentaries of the 1988 Convention On Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which amended the 1971 Convention, App. 60-66; evidence of the practice of the United States in permitting the export of peyote to Canada even though peyote contains mescaline which is controlled under the Convention, 241a; and evidence from the government's experts that the NAC uses peyote as a sacrament by eating the buttons of the

plant *and* by making a tea from parts of the plant containing mescaline and water, S/App. 1715, 1717, 1718.

The only "evidence" before the district court that the Convention applies to *hoasca* was the Dalton declaration, 265a-271a, which the court rejected, finding that "[t]here is no indication in this case that the State Department's interpretation is anything but an agency's litigation position," App. 4. The remainder of the evidence the court reviewed supported its conclusion that the Convention did not apply to *hoasca*. 242a.

The government asserts incorrectly that no dispute exists that *hoasca* is a "solution" or "mixture" within the meaning of the Convention. Pet. 21. The dispute regarding the applicability of the Convention centers precisely on its coverage of "preparations," which it defines only as "solutions or mixtures, in whatever state, containing one or more psychotropic substances." 52a. Yet, as the district court states, the Official Commentary to that section explains that "[t]he inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle." App. 58. The Commentary even gives examples: "Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles, mescaline, DMT, and psilocybine (psilocine, psilotsin)." (Footnotes omitted). *Id.* The Official Commentary to the 1988 Convention buttresses this conclusion by defining "preparation" as "the mixing of a given quantity of a *drug* with one or more other substances (buffers, diluents)." App. 56 (emphasis added). Thus *hoasca* is not within the definition of "preparation" because the "preparation" of *hoasca* is not created by mixing DMT with anything else.

The court would have had additional evidence that the Convention did not apply to *hoasca* had the government not

successfully objected to some of the UDV's evidence on the ground that the treaty was not a subject of the hearing. 104a. The evidence the UDV offered was a letter from the Executive Secretary of the International Narcotics Control Board (INCB) to the Ministry of Health of the Netherlands in response to a specific request regarding the legal status under the Convention of the same tea used by religious groups in the Netherlands. His opinion was clear: "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (*e.g.* decoctions) made of these plants, including *ayahuasca* are not under international control and, therefore, not subject to any of the articles of the 1971 Convention." App. 51-52.

The government filed a motion to stay the injunction in the district court and attached a new declaration from another assistant legal adviser in the State Department. In response, the UDV attached the excluded letter from the Executive Secretary of the INCB. The court denied the motion to stay and found that the INCB letter provided additional support for its conclusion that the Convention was not applicable to *hoasca*. App. 2-4.

In its next attempt to stay the injunction before the Tenth Circuit, the government attached three declarations–two from State Department legal advisors and one from a DEA Agent. In response, the UDV attached a declaration from Ambassador Herbert Okun, the diplomat who was for many years responsible for representing the United States' position on this treaty on the INCB, who is also of the opinion that the Convention does not cover *hoasca*. App. 48.

Ignoring this evidence, and having presented no evidence that any other country has interpreted the 1971 Convention to include *hoasca*, the government misrepresents to this Court that "the 160 Nations," pet. 16, that are parties to the 1971 Convention share the government's view that the Convention applies to *hoasca*. In fact, the record is devoid of

evidence to support that contention and–even at this stage–contains evidence that flatly contradicts it. For example, Brazil–the country where *hoasca* originates and an original party to the 1971 Convention–has long permitted the use of *hoasca* for religious purposes. G/App. 176. Additionally, the Court of Appeals in Paris, France recently ruled that the Convention does not prohibit the religious use of *ayahuasca*. App. 67-97. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) ("When [a treaty provision's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it.").

If the government has evidence that other countries share its position that the Convention applies to *hoasca*, it will have ample opportunity to present that evidence at trial.[14] But the existing record evidence is to the contrary. *See United States v. Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed."); *Air France v. Saks*, 470 U.S. 392, 400 (1985) (explaining that Court's interpretation "is consistent with the negotiating history of the Convention, the conduct of the parties to the convention, and the weight of precedent in foreign and American courts"); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259-60 (1984) ("In determining whether the Executive Branch's domestic interpretation of the Convention is consistent with the Convention's terms, our task is to construe a 'contract' among nations. The conduct of the contracting

[14] If the government now informs the district court (as it has not yet) that it wishes to prove that the Convention applies and that it needs to enforce it as to UDV, UDV will call Ambassador Okun and other eminent experts to testify respecting the Convention's coverage and the government's claim that our international relations will suffer if UDV is permitted to practice its religion.

parties in implementing that contract in the first 50 years of its operation cannot be ignored.").

The government next misrepresents the panel's decision, claiming that "the panel majority held only that the government had not demonstrated that compliance with the Convention was the least restrictive means of furthering the government's compelling interest in adhering to international obligations." Pet. 9. This is incorrect. The panel concluded that the government failed to meet even its *first* burden of showing a compelling interest. "Based on the record before us, we cannot conclude the government has demonstrated that 'application of the burden to the [UDV] (1) is in furtherance of a compelling government interest' . . ." 147a (quoting 42 U.S.C §2000bb-1(b)). Because the panel so found, it did not reach the issue of whether the Convention applied to *hoasca*.

Even if a court were to decide that the 1971 Convention applies to *hoasca*, but that RFRA requires a particular religious use to be excepted, the Convention anticipates and accommodates such exceptions. The plain language of the treaty–on which the government claims the courts must rely–could not be clearer: Its provisions are "[s]ubject to the constitutional limitations of a Party, its legal system and domestic law." 306a. In other words, if RFRA otherwise requires our government to accommodate UDV's exercise of religion, there is no violation of the Convention even if it were interpreted to apply to *hoasca*.

The government would limit this Court's consideration of the Convention to the three or four words in its text the government claims make it applicable to *hoasca*. Even if this were a defensible position, the United States must uphold other treaties. As the panel found, "even if the Convention does apply to *hoasca*, the United States has obligations under its laws and other international treaties to protect religious freedom. . . . 'The freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range

of acts . . . ' *U.N. Hum. Rts. Comm., General Comment No. 22,* at 4 (1993)." 146a. *See also* United Nations International Covenant on Civil and Political Rights, Article 18 (ratified by the U.S. in 1992) ("Everyone shall have the right to freedom of...religion. This right shall include freedom...to manifest his religion or belief in worship, observance, practice and teaching."); 1988 Convention On Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 14(2), 28 I.L.M. 493 (The measures taken "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use.").

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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March 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (a.k.a. Uniao do Vegetal) (USA) ("UDV-USA"), a New Mexico Corporation on its own behalf and on behalf of all its members in the United States, JEFFREY BRONFMAN, individually and as President of UDV-USA, CHRISTINA BARRETO, individually and as Secretary of UDV-USA, FERNANDO BARRETO, individually and as Treasurer of UDV-USA, CHRISTINE BERMAN, MITCHEL BERMAN, JUSSARA de ALMEIDA DIAS, PATRICIA DOMINGO, DAVID LENDERTS, DAVID MARTIN, MARIA EUGENIA PELAEZ, BRYAN REA, DON ST. JOHN, CARMEN TUCKER, and SOLAR LAW, individually and as members of UDV-USA,

Plaintiffs,

CIV. No.
00-1647 JP/RLP

v.

JOHN ASHCROFT, Attorney General of the United States, DONNIE R. MARSHALL, Administrator of the United States Drug Enforcement Administration, PAUL H. O'NEILL, Secretary of the Department of Treasury of the United States, DAVID IGLESIAS, United States Attorney for the District of New Mexico, and JOHN O'TOOLE, Resident Special Agent in Charge of the United States Customs Service Office of Criminal Investigation in Albuquerque, New Mexico, all in their official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

On November 25, 2002, the Defendants filed a Motion and Supporting Memorandum to Stay Preliminary Injunction Pending Appeal (Doc. No. 107). A hearing was held on the motion to stay on December 2, 2002. Plaintiffs' counsel John Boyd and Nancy Hollander, Plaintiff Jeffrey Bronfman, and Defendants' counsel Elizabeth Goitein participated in the hearing. Having considered the briefs, arguments of counsel, and the relevant law, the Court finds that the motion to stay should be denied.

A. Discussion

To obtain a stay of an injunction pending appeal, the applicant must address the following factors: "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Tenth Circuit has elaborated on these factors by stating that: "If [applicants] can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.'" *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (citations omitted).

1. Likelihood of Success on the Merits

The Defendants make three arguments to demonstrate a strong likelihood of success on appeal. First, the Defendants argue that the Court of Appeals will agree with the Defendants' interpretation of the 1971 Convention on Psychotropic Substances (Convention). Second, the Defendants argue that the Court of Appeals will find a compelling interest in protecting the health and safety of UDV members. Third, the Defendants argue that the Court of Appeals will find a compelling interest in preventing diversion of hoasca.

a. The 1971 Convention on Psychotropic Substances

The Defendants argue that the Convention applies to hoasca under the definition of a "preparation" (a solution or mixture) containing a Schedule I substance. The Defendants also argue that the Court failed to accord due deference to the interpretation of the Convention by the State Department which states that "the Convention on Psychotropic Substances imposes an obligation on the United States to prohibit the use, manufacture, import or export of any controlled substance on Schedule I, such as DMT, and any preparation containing such a controlled substance, such as the ayahuasca tea transported for Brazil." The Plaintiffs note, however, that the Secretary of the United Nations International Narcotics Control Board, the agency which enforces the Convention, wrote an apparently unofficial letter dated January 17, 2001, which stated that: "No plants (natural materials) containing DMT are a [sic] present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including

ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention."

The Court is not obliged to accept an agency interpretation which is unreasonable. *El Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."). In light of the Court's Memorandum Opinion and Order (Doc. No. 88), filed August 12, 2002, which fully supports the finding that the Convention does not apply to hoasca, the Court finds that it is not required to give due deference to the State Department's interpretation of the Convention. Morever, the Court is not required to give due deference to an agency's litigation position if that position is not a long-standing agency view. *BMW of North America v. U.S.*, 39 F.Supp.2d 445, 449 (D.N.J. 1998) (quoting *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 198 (3d Cir.1997)). There is no indication in this case that the State Department's interpretation is anything but an agency's litigation position. In addition, the January 17, 2001 letter by the Secretary of the United Nations International Narcotics Control Board, although not previously before this Court and not binding on this Court, provides a further indication that the Court properly found that the Convention does not apply to hoasca. The Court concludes that the Defendants have not made a strong showing that they would likely be successful on appeal with respect to the issue of whether the Convention applies to hoasca.

b. Compelling Interest in Protecting the Health and Safety of UDV Members

The Defendants argue that the Court should have deferred to Congress's factual finding that DMT is unsafe, and then considered whether the government had a compelling interest in prohibiting the Plaintiffs, in particular, from using DMT. The Defendants argue that the government has a compelling interest in prohibiting the Plaintiffs from using DMT. The Defendants further argue that since the Court found that the evidence was in "equipose" with respect to the hoasca's health risks, this case is one in which there are "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issue ripe for litigation and deserving of more deliberate investigation." *See McClendon*, 79 F.3d at 1020 (10th Cir. 1996). Alternatively, the Defendants argue that the evidence clearly showed the health risks associated with drinking hoasca. The Plaintiffs argue persuasively, on the other hand, that this Court has already carefully considered the evidence on this point and concluded that the Defendants failed to carry their burden under the Religious Freedom Restoration Act (RFRA). Considering the Court's thorough review of the health related evidence presented by the parties' experts, the Court concludes that the Defendants have failed to demonstrate a strong showing that they would likely succeed on appeal on the issue of whether the United States has a compelling interest in the health and safety of the UDV members.

c. Compelling Interest in Preventing Diversion of Hoasca

The Defendants argue that the evidence shows that hoasca would likely be diverted. The Defendants argue

alternatively that the Court's finding that the evidence was "virtually balanced" is sufficient reason to grant the stay because the case presents "serious" and "difficult" questions "deserving of more deliberate investigation." Again, the Plaintiffs persuasively argue that the Court has already sufficiently considered the evidence with respect to the likelihood of diversion and concluded that there is not a compelling interest in preventing diversion of hoasca. The Court concludes that the Defendants have not shown that there is a strong likelihood of success on appeal on the issue of whether the United States has a compelling interest in preventing diversion of hoasca.

d. Close Questions

The Defendants argue throughout their motion that the closeness of the evidence supports a finding under *McClendon* that there is a likelihood of success on appeal. The *McClendon* holding that close questions amount to a likelihood of success on appeal applies only if the other requirements for a stay are met. As shown below those other factors have not been met.

2. Threat of Irreparable Harm

The Defendants argue that the United States would be harmed if it was required to violate "a critical international treaty." Linda Jacobson, Assistant Legal Adviser for Law Enforcement and Intelligence at the State Department declared (attached to motion for stay) that: "If the United States were compelled to end compliance with the Convention, even if only for a temporary period pending appeal, this could seriously undermine the United States' ability to insist upon strict compliance by other treaty

partners. Furthermore, such non-compliance by the United States, even if temporary, would likely undercut ongoing diplomatic efforts to urge other countries to comply fully with this Convention." The Defendants also argue that if the preliminary injunction is allowed to go into effect the public health could be irreparably harmed and there would be a "high potential for diversion." Finally, the Defendants argue that these irreparable harms outweigh any harm the Plaintiffs would suffer by being denied use of the hoasca tea either temporarily pending appeal or permanently if the Court of Appeals rules in the Defendants' favor.

The Plaintiffs correctly argue that the Defendants have not shown that the United States will suffer from any irreparable injury if the Convention is violated. The Plaintiffs note that the Defendants are merely speculating that the United States' reputation as a leader in the war on drugs will be "tarnished." Moreover, the detailed provisions of the Preliminary Injunction adequately address the Defendants' concerns regarding the health risks of the UDV members and potential diversion. The Court, therefore, concludes that the Defendants have failed to show that they will suffer from irreparable injury if the Preliminary Injunction is not stayed pending appeal.

3. Public Interest

The Defendants argue that "[b]ecause RFRA does not in fact prohibit the government from enforcing the CSA against Plaintiffs, allowing Plaintiffs to use hoasca does not vindicate any of the rights that RFRA protects, and therefore does not serve the public interest." The Defendants also argue that there is a public interest in

protecting the UDV member's health, preventing diversion of hoasca, and in adhering to the international Convention. The Plaintiffs, however, successfully argue that there is a strong public interest in following RFRA. *See Jolly v. Coughlin*, 907 F.Supp. 63, 65 (S.D.N.Y. 1995), *aff'd*, 76 F.3d 468 (2d Cir. 1996), *overruled on other grounds, City of Boerne v. Flores*, 521 U.S. 507 (1997) (defendants failed to show that their concerns outweigh the "strong public interest in following the law, namely RFRA and the Eighth Amendment to the Constitution."). Furthermore, the Preliminary Injunction adequately addresses the Defendants' concerns regarding the health risks of the UDV members and potential diversion of hoasca. The Court concludes that the Defendants have failed to show that the public interest would be harmed if the Preliminary Injunction is not stayed pending appeal.

IT IS ORDERED that Defendants' Motion and Supporting Memorandum to Stay Preliminary Injunction Pending Appeal (Doc. No. 107) is denied.

/s/ James A. Parker
CHIEF UNITED STATES
DISTRICT JUDGE

No. 02-2323

The United States Court of Appeals

for the Tenth Circuit

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.,
Plaintiffs-Appellees,

v.

JOHN ASHCROFT, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
For the District of New Mexico

The Honorable James Parker
Chief District Judge
Dist. Ct. No. CV 00-1647

BRIEF *AMICI CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE NATIONAL ASSOCIATION OF EVANGELICALS, CLIFTON KIRKPATRICK AS THE STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AND THE QUEENS FEDERATION OF CHURCHES, IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

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Corporate Disclosure

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that they are incorporated as nonprofit corporations, they have no parent corporations, they have issued no publicly-held stock, and they are not trade associations.

Statement of Identity, Interest, and Authority to File of *Amici*

The four *amici*, which can be fairly said to represent millions of Americans, are deeply committed to the principle of genuine religious freedom for all. They believe that the Religious Freedom Restoration Act is a critical means of protecting this foundational freedom. They also believe that the proper interpretation and application of the Act is essential to its success.

A detailed statement of interest for each of the four *amici* is found in Appendix A to this brief.

Consent to file this brief has been obtained from counsel for both parties.

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SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act (RFRA) is designed to ensure that believers of all religious faiths may follow their conscience without unnecessary restriction from federal laws and regulations. When the federal government imposes a substantial burden on religious exercise, RFRA requires the government to prove that application of the burden furthers a compelling governmental interest and does so by the least restrictive means. In order for the statute to achieve its purpose, courts must hold the government to these standards of justification in each individual case. This requirement applies when, as here, the religious exercise is the use of a controlled

substance as the central sacrament of a sincere religious ritual. It is unquestioned that in prohibiting the importation of hoasca tea and threatening members of the 0 Centre Espirita Beneficiente Uniao do Vegetal (UDV) with criminal prosecution, the government will be destroying the UDV's religious worship as it now exists – tantamount to banning the wine served at a Roman Catholic mass. The government should have to make a very strong showing of public necessity before RFRA countenances such a severe burden on religious practice.

In entering a preliminary injunction in favor of the UDV in this case, the district court faithfully followed the dictates of RFRA, guided by the statute's text, its purposes and background, and the clear precedents of this Court. The government's arguments on appeal, if accepted, would seriously undercut RFRA's purpose of protecting the religious conscience of all faiths.

Most importantly, the district court properly required the government to establish a compelling interest not in prohibiting drugs in general, but in prohibiting the particular religious use in this case – the ingestion of hoasca by UDV members during their religious ritual. Accordingly, the district court properly took evidence on the harm that would be caused by ingesting this particular substance in this limited context. The government's argument that a court should simply defer to Congress's listing of hoasca as a controlled substance runs directly counter to RFRA. There is no exception to the statute's requirements for drug laws.

Assessing this evidence, the court found that it was "in equipoise" as to whether or not the UDV's sacramental use of hoasca would create serious risks of harm to the

members or a significant risk of diversion to non-religious uses. This factual finding should be reviewed only for clear error, and it is sufficiently supported by the record. The court was also correct in requiring that the risks of harm to UDV members or diversion to non-religious uses be "serious" and "significant." Any less stringent standard would be inconsistent with the compelling interest test and would severely undermine the effectiveness of RFRA.

ARGUMENT

The Religious Freedom Restoration Act provides that government may not impose a "substantial burden" on a person's religious exercise unless the government demonstrates that application of the burden to the person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The severity of the burden on religious practice here is unquestioned. In considering whether the government met its burden of demonstration, the district court followed the proper analysis, and the government's attacks on the district court's reasoning should be rejected.

I. The District Court Correctly Took Evidence on the Specific Question Whether the UDV's Use of Hoasca Poses Sufficient Harm to Satisfy the Compelling Interest Standard.

The district court held a two-week trial and issued a carefully reasoned 60-page opinion concluding that the use of hoasca in UDV religious ceremonies was not sufficiently dangerous that prohibiting such use was the least restrictive

means of furthering a compelling interest. The government contends that "the district court should have rejected plaintiffs' RFRA claim as a matter of law, without the need to conduct an evidentiary hearing to determine for itself whether plaintiffs' use of hoasca actually poses unacceptable risks." Br. for Appellants at 21. This position flies in the face of the text and the most fundamental premises of the statute.

The government concedes that it bears the burden of proof. RFRA defines "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). As this Court has held, "The government bears the burden of building a record that proves that the [regulation] in question is the least restrictive means of advancing the government's compelling interest." *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc); accord *Werner v. McCotter*, 49 F.3d 1476, 1480 & n.2 (10th Cir. 1995).

Most importantly, the government must show the compelling interest not with respect to the law in general, but with respect to the particular religious conduct in question. As the district court said, the question was not "whether, in the abstract, the federal government has a compelling interest in protecting [h]ealth and safety" or prohibiting drugs; rather, the question is whether "applying the [drug law] to the UDV's consumption of hoasca *furthers*" that general interest. App. at 91 n.8 (emphasis in original). The court correctly looked beyond Congress's designation of hoasca as a controlled substance and took evidence concerning the UDV's specific use.

RFRA explicitly requires that the "application of the burden to the person" must further the government's

compelling interest, 42 U.S.C. § 2000bb-1(b) – not merely that the law in general further that interest. In this Court's words, "under RFRA, a court does not consider the [law] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [law] to the individual claimant." *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001). Likewise, in *Hardman*, this Court sitting en banc held under RFRA that exemption from the federal law prohibiting possession of eagle parts should extend beyond members of federally recognized Native American tribes to other persons who possessed eagle feathers as part of the sincere practice of Native American religion. The "crucial" question, the majority held, was "what the effect would be of expanding the register" of those eligible to possess eagle parts include these non-tribal claimants – or in other words, "to what degree excluding non-tribal members from the permitting scheme advances the government's interest" *Id.* at 1133 n.21, 1133. The government lost because it had "failed to build an adequate record" on this specific question. *Id.* at 1133.[1]

This method of judging the government's interest "at the margin"[2] – the need not for the law in general, but for applying it to the claimant in question – also follows from

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[1] The legislative history confirms that the compelling interest standard "should be interpreted with regard to the relevant circumstances in each case." S. Rep. No. 103-111, *Religious Freedom Restoration Act of 1993*, 1993 U.S. Code Cong. & Admin. News 1892, 1898.

[2] See, e.g., Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 148 (1995); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Villanova L. Rev. 1, 40 (1994).

one of the two Supreme Court decisions that served as RFRA's model, *Wisconsin v. Yoder,* 406 U.S. 205 (1972). See 42 U.S.C. § 2000bb(b)(1) (purpose of RFRA is "to restore the compelling interest test as set forth in [inter alia] *Yoder*"). In *Yoder,* where Amish parents objected to state law insofar as it required them to send their children to school after age 14, the Court accepted that education in general was a "paramount" state interest. 406 U.S. at 213. But it added that "[w]here fundamental claims of religious freedom are at stake, [w]e cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote, . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exception." *Id.* at 221. After examining the extensive trial record, the Court concluded that the evidence showed that requiring two more years of formal schooling for Amish teenagers "would do little to serve those [educational] interests." *Id.* at 222; see *id.* at 236 ("it was incumbent on the State to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish").

Accordingly, the district court was absolutely correct to take evidence to determine whether applying the hoasca prohibition to the UDV's particular use would sufficiently "further" the government's interests ("advance" or "serve" them, as *Hardman* and *Yoder* put it). Under RFRA, a court may not simply defer to the legislature's general treatment of a problem – not to Congress's general scheduling of a controlled substance, any more than to the state's judgment in *Yoder* that education is generally important, or the congressional judgment in *Hardman* that eagles generally need protection as an endangered species. The

legislature's determination that a law is generally important is not a determination that the law must be applied in this particular circumstance. In determining that DMT poses substantial dangers in general, Congress did not determine that the substance poses such dangers when used in the limited quantities and controlled circumstances of a UDV religious ritual. RFRA directs the court to answer that latter, more specific question; it thereby makes it possible, in the words of the statute, to "strik[e] sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

The government tries to claim that the framework does not apply – that the court should simply defer to Congress's generalized judgment about hoasca – because this case involves a drug. See, e.g., Br. for Appellants at 20-21. But there is no exception in RFRA for drug cases. The compelling interest standard, with its focus on the specific harm caused by the claimant's use, applies to "all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

The lower court cases cited by the government (Br. for Appellants at 25, 38-44) are inappcsite because they all involved the claimed religious use of marijuana, which as the district court recognized has "significant differences" in its characteristics from those of hoasca. App. at 88. The more relevant analogy to this case is the sacramental use of peyote, which is protected by statutory exemptions under both federal law and many state laws – and which a number of courts have declared to be constitutionally protected under the compelling interest test that governed Free Exercise Clause cases before *Employment Division v.*

Smith, 494 U.S. 872 (1990).[3] See *Smith v. Employment Division*, 307 Or. 68, 763 P.2d 146 (1988), rev'd, 494 U.S. 872; *Whitehorn v. State*, 561 P.2d 539 (Okla. Crim. App. 1977); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973); *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); see also *Peyote Way Church of God v. Smith*, 742 F.2d 193 (5th Cir. 1984) (reversing summary judgment that had approved applying peyote prohibition to the sacramental use of peyote).

These and other decisions have identified the differences that make marijuana exemptions unjustifiable, but peyote exemptions acceptable in some circumstances. First, while marijuana is addictive or often serves as the gateway to other addictive drugs, peyote seldom does. See *Whittingham*, 19 Ariz. App. at 30, 504 P.2d at 953; *Woody*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. Second, there is extensive traffic in marijuana, but not in peyote. *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463 (D.C. Cir. 1989) (R.B. Ginsburg, J.). Third, typically the religious groups using marijuana call for "continuous and public use" of the drug, *Olsen v. State of Iowa*, 808 F.2d 652, 653 (8th Cir. 1986); by contrast, peyote groups limit their use to a "precisely circumscribed ritual" (*Olsen v. DEA*, 878 F.2d at 1464), in small and carefully monitored amounts (*Whittingham*, 19 Ariz. App. at 30, 504 P.2d at 953; *Peyote Way Church of God*, 742 F.2d at 196), and prohibit its use outside the ceremony (*id.* at 196).

[3] In *Smith*, which itself concerned Native American peyote use, the Supreme Court abandoned the compelling interest test for free exercise claims in general. As to federal laws, RFRA restores by statute the standard for religious freedom claims that *Smith* rejected.

Given the uniformly recognized differences between marijuana and other drugs such as peyote, courts might appropriately reject marijuana exemptions under RFRA as a matter of law, without inquiring into the circumstances of the particular religious use. But if that per se approach is appropriate at all, it should apply only in the narrow circumstances where an exemption has already been repeatedly and definitively rejected. If the per se approach were extended as the government calls for here – applying broadly to any case simply because it involves controlled substances – it would undercut RFRA's fundamental premise that the government must justify "application of the burden to the [particular] person" (42 U.S.C. § 2000bb-1(b)).

Every one of the features distinguishing marijuana from peyote also figured in the district court's conclusion that an exemption for the UDV's use of hoasca would not create serious enough risks to satisfy the standards of RFRA. There was evidence to show that in the form of the hoasca tea, the DMT substance is not seriously harmful physically or psychologically (App. at 96-103); that hoasca lacks a significant potential for abuse because (like peyote) it is unpleasant to ingest (*id.* at 49-50); that the UDV carefully limits and monitors the use of hoasca, prohibits use outside the ceremony, and would likely cooperate in preventing diversion to other uses (*id.* at 37-38, 52); and that, like the peyote groups, the UDV has in fact increased the responsible behavior of its members. *Id.* at 34; see *Woody*, 61 Cal. 2d at 722-23, 394 P.2d at 818, 40 Cal. Rptr. at 74. Although there was also evidence pointing the other way, these factors concerning hoasca clearly make it different from marijuana, and made it appropriate for the

district court to examine in detail whether the UDV's particular use would pose serious harms.

This Court emphasized the need to adhere to fact-specific inquiry in *Mosier v. Maynard*, 937 F.2d 1521 (10th Cir. 1991), which reversed a summary judgment against a Native American prisoner who had challenged a state policy limiting his hair length. Previous decisions had upheld such limits as reasonably related to penological concerns (the test, far more deferential than RFRA, that governs challenges to state prison rules). Even under this test, this Court said: "[W]e recognize that prisoners have been singularly unsuccessful . . . in challenging grooming codes, . . . but this does not obviate the need for facts upon which to base a reasonableness determination." *Id.* at 1525 n.2. All the more then, the courts' rejection of marijuana exemptions "does not obviate the need for facts" to show that prohibiting other drugs in controlled religious settings meets the necessity standard of RFRA.[4]

Precisely the same flaw infects the government's claim that exempting the UDV's religious use would "'result in significant administrative problems . . . and open the door to a myriad of claims for religious exceptions.'" Br. for Appellants at 43 (quotation omitted). The government cannot satisfy its RFRA burden with such "[m]ere speculation" and "'conclusory statements'" (*Hardman*, 297 F.3d at

[4] Indeed, even in a case involving marijuana possession, the Ninth Circuit reversed a grant of summary judgment for the government because the district court had wrongly "treated the existence of the marijuana laws as dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana." *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996).

1130 (quoting *Werner*, 49 F.3d at 1480)); it must offer convincing evidence in the light of the facts. In the other key Supreme Court decision that RFRA incorporates, *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a person with religious objection to Saturday work could not be denied unemployment benefits, because the state had "suggest[ed] no more than a possibility" of future fraudulent claims and had not offered the necessary "proof . . . to warrant such fears." *Id.* at 407. Again, the government's cases (Br. for Appellants at 43) are inapposite because they involved claimants who continually smoked marijuana. Given that unrestricted behavior and the substantial traffic in marijuana, the government could rightly fear that the exemption would require continuous oversight and would be difficult to confine. But for the reasons given above, it may not simply be assumed that the same problems will arise from an exemption for a group that ingests hoasca (a far less pervasive drug) in a ritual that it circumscribes and monitors itself. As the Supreme Court has recognized in another context, "the necessity for intensive government surveillance" depends on whether the conduct being regulated is pervasive or circumscribed. *Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (need for government surveillance to prevent religious uses of state aid is "diminished" when recipient is not "pervasively sectarian").[5]

[5] The government's warning that there is another religious group that "exercises relatively few controls over [its] use of" hoasca (Br. for Appellants at 44) has an obvious answer. If another group's use differs so much from the UDV's that this other use poses significant problems that the UDV's does not, then the other group may be denied an exemption under the compelling interest test.

(Continued on following page)

Finally, the same principle applies to the government's assertion that there is a "compelling interest [in] maintaining strict compliance with the 1971 Convention [on Psychotropic Substances]." Br. for Appellants at 19. As the government concedes, treaties are just as subject to the compelling interest test as are other federal laws. *Id.* at 27. Again, the issue is not whether the government has a compelling interest in complying with treaties in general, but whether permitting the UDV's use in particular (even assuming that such permission violated the treaty) would sufficiently undermine a compelling interest. For the reasons set out in the UDV's brief (see Appellees' Br. at 37-40), *amici* do not believe that government has made such a showing on these facts.

II. The District Court Properly Held That the Government Had to Show More Than "Equipoise" in the Evidence Concerning the Risk of Harm from the UDV's Religious Use.

After hearing two weeks of testimony, the district court devoted 26 pages of its opinion to a painstaking review of the evidence whether the UDV's sacramental use of hoasca would create risks of harm to UDV members or diversion to non-religious uses. The court concluded that the evidence was "in equipoise" on whether the UDV's use

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We also note, with the UDV, that the "reason the UDV is now subject to 'official supervision' is because *the defendants* successfully insisted below, over the UDV's objection, that the court require the UDV to comply with various DEA commercial regulations." Appellees' Br. at 32 (emphasis in original). We agree that when the government insisted on regulations below, it should not be able to turn around on appeal and claim that those regulations are too burdensome on it.

would or would not create these harms. App. at 103-104, 111. It then held that when the evidence is balanced and inconclusive in this way, the government fails to meet its "onerous" and "difficult" burden under RFRA. *Id.* These conclusions should be upheld.

A. The District Court's Findings Concerning the Risk of Harm are Subject Only to Clear Error Review.

Amici leave it to the parties to provide a detailed review of the district court's findings concerning the risks of harm posed by the UDV's religious use of hoasca and its finding that the evidence was in equipoise. Those findings are supported by the record, and because they are findings of fact, the issue on appeal is only whether they are clearly erroneous. See Fed. R. Civ. P. 52(a). It is true, as the government says, that "[w]hether something qualifies as a compelling interest is a question of law" reviewed *de novo*. *Hardman*, 297 F.3d at 1127; see Br. for Appellants at 23. But the question to what extent the UDV's use would actually undercut the government's generalized interest is plainly a question of fact. For example, this Court in *Hardman* required the government to show that granting the claimed exemption for possession of eagle parts would sufficiently undercut the government's interests – precisely the question involved in this case – and the Court repeatedly referred to that question as turning on "factual findings" (297 F.3d at 1135) and "hard evidence" (*id.* at 1132, 1133).

In RFRA cases (as in appeals generally), this Court has said that "[a]s to historical and other underlying factual determinations we defer to the district court, reversing only if the court's findings are clearly erroneous." *Thiry v.*

Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996); *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). Whether the UDV's hoasca use will cause physical or psychological harm or be diverted to other uses are quintessential "historical [and] underlying fact[s]." As the district court's opinion shows, these questions turn heavily on the interpretation of studies and other data and the evaluation of witnesses' credibility, especially the conflicting expert witnesses who testified. Such matters are left primarily to the district court, and there is no reason to overturn the careful findings that the court made here.

To be sure, the next and ultimate question is whether this "virtually balanced" evidence actually met the legal standard of justification that RFRA demands of the government. The district court held that such inconclusive evidence did not satisfy the government's "onerous" and "difficult" burden. App. at 104, 111. *Amici* agree that this determination – whether or not evenly balanced evidence meets the RFRA standard – is a question of law reviewed *de novo*. See *Meyers*, 95 F.3d at 1482 (*de novo* review for "the meaning of the RFRA" and for "the ultimate determination as to whether the RFRA has been violated"). But as we now discuss, the court was absolutely correct to put this level of burden on the government.

B. The Government Must Show That a "Serious" or "Significant" Degree of Harm Would Follow from Exempting the UDV's Religious Use.

Holding that an equipoise of evidence was not enough to satisfy RFRA, the court required the government to prove more than just a possibility that hoasca would harm UDV members or be diverted to non-religious uses. The

court required the government to prove that hoasca use in the sacramental setting "poses a *serious* health risk to the members of the UDV" and that allowing such use "would lead to *significant* diversion of the substance to non-religious use." App. at 91 (emphases added). The court was absolutely correct to adopt this strong standard.

As noted earlier, the question under RFRA is whether "application of the burden to th[is] person" meets the compelling interest standard: the court "considers whether there is a compelling government reason . . . to apply the [r]egulation to the individual claimant." *Kikumura*, 242 F.3d at 962. If exempting the individual claimant(s) in question has merely a small impact on the effectiveness of the relevant law, then the reason for applying the statute to the claimant(s) is not compelling. The negative impact on the government's interests must be of a higher degree. The district court's terms are entirely appropriate in this context: the harm to the government's interests must be "serious" or "significant." Otherwise, as the court held, the application of the burden to the claimant does not sufficiently "further[]" the government's interests within the meaning of the statute.[6]

Such a stringent principle is demanded by the compelling interest test, which the Supreme Court has described as "the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

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[6] Precisely the same approach and result follow under the "least restrictive means" prong of RFRA. If a limited exemption from the law for religious uses will not seriously or significantly increase the harms that the government fears, then applying the law generally but exempting the religious user is the "least restrictive means of furthering [the] governmental interest." 42 U.S.C. § 2000bb-1(b).

The decisions that RFRA incorporates specifically speak of the government's need to prove "some *substantial* threat to public safety, peace, or order." *Yoder*, 406 U.S. at 230 (emphasis added) (quoting *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)). The principle is also reflected in *Hardman*. There the government argued that broadening the category of persons who could seek permits to possess eagle body parts would result in longer waits for permits, thereby encouraging poaching and endangering Native American tribes' access to parts. But this Court found a lack of evidence "that increased waits will result in *sufficient* poaching to frustrate the government's interest in protecting eagle populations," or that "there are *substantial* numbers of [additional] individuals" who would become eligible for permits and would produce "an increased wait *substantial enough* to endanger Native American cultures." 297 F.3d at 1132, 1133 (emphases added).

A strong standard is also particularly appropriate here given the severity of the threatened burden on the UDV: the loss of the ability to engage in a ritual act of worship that is central to its faith. As already noted, the purpose of RFRA is to "strik[e] sensible balances between religious liberty and ... governmental interests" (42 U.S.C. § 2000bb(a)(5)); accordingly, a severe burden such as this demands a strong showing to justify it.

Finally, such a strong standard is crucial to the effectiveness of RFRA in general. Exempting the claimant(s) in question will almost always produce some increased risk of the harm that the government fears; if any increased risk is deemed sufficient to implicate a compelling government interest, the statute will be stripped of any force. RFRA must be interpreted as the district court

did, to require a serious or significant risk of harm from exempting the claimant(s) in question.[7]

III. The Statutory Exemption for Sacramental Peyote Use Supports, Rather Than Undercuts, the UDV's RFRA Claim.

Finally, *amici* believe it important to point out one other argument in the government's brief that is deeply flawed and would be destructive of accommodations for religious freedom. The government claims that the exemption of sacramental peyote use in the American Indian Religious Freedom Act (42 U.S.C. § 1996a) implies that this and similar uses are not protected by RFRA. Br. for Appellants at 39 ("[the specific exemption] would not have been necessary if Congress believed that RFRA alone afforded religious adherents an exemption"). This argument stands the case law on its head. Numerous decisions hold that the existence of a specific statutory exemption indicates that the government *lacks* a compelling interest in regulating analogous conduct. See, e.g., *Yoder*, 406 U.S. at 236 & n.23 (other states' recognition of Amish vocational schools showed that state could "serve its interests without impinging on [Amish] free exercise"); *Sherbert*, 374 U.S. at 407-08 n.7 (Sabbatarian's free exercise claim for unemployment benefits was bolstered by fact that

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[7] There are cases, of course, in which the act being regulated inherently implicates a compelling interest, because it directly harms another, non-consenting person. But *Yoder* indicates that when the religious act in question does not involve such direct harm to another person – as is the case with the circumscribed use of a drug in a religious ritual – courts must "searchingly examine" whether the threat to public safety or order from the particular act is "substantial." 406 U.S. at 221, 230.

numerous states already provided benefits in such cases); *Peyote Way Church of God*, 742 F.2d at 201 (federal and state exemptions for Native American peyote use tend "to negate the existence of a compelling state interest in denying the same use to [a similar group]"). Because there are similarities between peyote and hoasca use in circumscribed religious rituals, the fact that the peyote exemptions have not produced serious consequences is plainly evidence that a similar exemption for the UDV's use would not undermine a compelling interest. And as the UDV argues (Appellees' Br. at 35), Congress could have had numerous reasons for exempting peyote use that do not reflect negatively on RFRA protection for comparable religious activity.

Accepting the government's argument would have terrible consequences. Adherents of a particular faith, or proponents of religious freedom in general, might be discouraged from seeking a particular federal or state statutory exemption, for fear that it would be taken to mean that similar conduct fell outside of RFRA or a counterpart to RFRA enacted in another state.[8] The government's argument must be explicitly rejected because it would undermine "our happy tradition" of "accommodat[ing] free exercise values" through statutory exemptions (*Gillette v. United States*, 401 U.S. 437, 453 (1971)).[9]

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[8] See, e.g., New Mexico Religious Freedom Restoration Act, N.M.S.A. §§ 28-22-1 to 28-22-5 (applying compelling interest/least restrictive means test to state laws and regulations).

[9] The approving reference to this argument in the stay panel opinion (see *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002)) makes it all the more

(Continued on following page)

CONCLUSION

The district court's judgment entering a preliminary injunction rests on sound legal reasoning and is supported by the factual record. It should be affirmed.

Respectfully submitted,

/s/ Gregory S. Baylor
Gregory S. Baylor
Counsel for *Amici Curiae*

Certificate of Compliance

Please complete one of the sections:

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,903 words.

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important that this Court, in its full consideration, clearly state that the argument should be rejected.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Gregory S. Baylor
[Signature of attorney or pro se party]

Certificate of Service

The undersigned hereby certifies that he caused two true and accurate copies of the foregoing Brief *Amici Curiae* of Christian Legal Society, *et al.*, in Support of Appellees Urging Affirmance to be served both by United States Mail, postage prepaid, and by electronic mail, on February 21, 2003 upon:

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/s/ Gregory S. Baylor
Gregory S. Baylor

Detailed Statements of Interest of *Amici Curiae*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inherec in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is

also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty that [sic] to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law . . . "

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of American heritage.

Clifton Kirkpatrick as the Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the **Presbyterian Church (U.S.A.).** The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,500,000 active members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

The Presbyterian Church (U.S.A.) has, since the effective date of the Religious Freedom and Restoration Act, vigorously supported the protections of religious freedom afforded by the act. It urges this Court to continue to protect religious freedom in the United States by applying the Religious Freedom Restoration Act requirement that the government prove that application of a substantial burden on religious exercise furthers a compelling governmental interest and does so by the least restrictive means. The Stated Clerk does not make any claim to determine whether or not the facts in this case furthers a compelling governmental interest and does so by the least restrictive means.

The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 360 local churches representing every major Christian denomination and many independent Christian congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amici curiae* previously in a variety of actions for the purpose of defending religious liberty. The Queens

Federation of Churches and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty, believing that RFRA property guards against governmental indifference or hostility to religious sacramental practice.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

O CENTRO EXPIRITA BENEFICIENTA UNIAO DO VEGETAL, a New Mexico corporation, JEFFREY BRONFMAN, individually and as President of UDV-USA, DANIEL TUCKER, individually and as Vice-President of UDV-USA, CHRISTINA BARRETO, individually and as Secretary of UDV-USA, FERNANDO BARRETO, Treasurer of UDV-USA, CHRISTINE BERMAN, MICHAEL BERMAN, JUSSARA DE ALMEIDA DIAS, DAVID LENDERTS, DAVID MARTIN, MARIA EUGENIA PELAEZ, BRYAN REA, DON ST. JOHN, CARMEN TUCKER, SOLAR LAW, individually and as members of UDV-USA,

Plaintiffs,

vs.

CIVIL NO. 00-1647 JP/RLP

JANET RENO, Attorney General of the United States, DONNIE R. MARSHALL, Administrator of the U.S. Drug Enforcement Administration, LAWRENCE H. SUMMERS, Secretary of the Department of Treasury of the United States, NORMAN BAY, U.S. Attorney for the District of New Mexico,

Defendants.

INITIAL SCHEDULING ORDER

This cause is assigned to me for scheduling, case management, discovery and other non-dispositive motions. The Federal Rules of Civil Procedure, as well as the local rules of the Court, shall apply to this lawsuit.

The parties, appearing through counsel or *pro se,* shall **"meet and confer" twenty-one (21) days** prior to the initial scheduling conference to formulate a provisional discovery plan. Fed. R. Civil. P. 26(f). The time allowed for discovery is generally 120 to 150 days. The provisional discovery plan shall be filed with the Court no later than ***February 28, 2005***.

The parties will cooperate in preparing an Initial Pre-Trial Report (IPTR) which follows the sample IPTR obtainable from the Clerk of the Court.[1] The blanks for dates should *not* be filled in. The city or town of residence of each witness listed shall be included in order for the trial judge to consider in determining the trial location. Plaintiff, or Defendant in removed cases, is responsible for submitting the IPTR to my office by ***February 28, 2005***.

Good cause must be shown and Court approval obtained for any modification of the IPTR schedules.

Initial disclosures under Fed. R. Civ. P. 26(a)(1) shall be made within fourteen (14) days of the meet-and-confer session.

[1] Please contact the Clerk's Office to obtain a copy of the new standardized Initial Pre-Trial Report form amended by the Court in September 2002.

Motions to amend pleadings and join additional parties shall be filed and served at least 5 days prior to the Rule 16 Scheduling Conference.

A Rule 16 scheduling conference will be held in my chambers on **March 9, 2005**, at **9:00 a.m.**[2] At the Rule 16 scheduling conference, counsel shall be prepared to discuss discovery needs and scheduling, all claims and defenses, the use of scientific evidence and whether a *Daubert*[3] hearing is needed, initial disclosures, and the time of expert disclosures and reports under Fed. R. Civ. P. 26(a)(2). We shall also discuss settlement prospects and alternative dispute resolution possibilities and consideration of consent pursuant to 28 U.S.C. § 636(c). Client attendance is not required. If service on all parties is not complete, plaintiff(s) appearing through counsel or *pro se* plaintiff, is (are) responsible for notifying all parties of the content of this order.

Pre-trial practice in this cause shall be in accordance with the foregoing.

/s/ Richard L. Puglisi
RICHARD L. PUGLISI
United States Magistrate Judge
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Suite 730,
Albuquerque, NM 87102
505-348-2360 (FAX 348-2364)

[2] Out of town counsel may appear by telephone. Please advise my chambers at least 24 hours prior to the scheduling conference if any, or all counsel, will appear by telephone. Counsel appearing by telephone are responsible for placing the telephone conference call.

[3] *Daubert v. Merrell Dow Pharmaceuticals,* 113 S.Ct. 2786 (1993).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, *et al.*,	)	
Plaintiffs,	)	No. CV 00-1647 JP/RLP
v.	)	
ALBERTO GONZALES,[1] *et al.*,	)	
Defendants.	)	

DEFENDANTS' COMBINED MOTION TO EXTEND DEADLINES IN INITIAL SCHEDULING ORDER/OPPOSITION TO MOTION FOR SCHEDULING CONFERENCE

On January 31, 2005, the Plaintiffs in the above-captioned matter moved for a scheduling conference to establish deadlines in preparation for a final hearing on the merits of the case. The following day, Magistrate Judge Richard L. Puglisi issued an Initial Scheduling Order providing for the prompt commencement of pre-trial activity. Today, the Acting Solicitor General, on behalf of the Defendants, asked the United States Supreme Court to review the judgment of the United States Court of Appeals for the Tenth Circuit upholding the preliminary injunction in this case. For the reasons set forth below, Defendants oppose Plaintiffs' motion and respectfully request a postponement of the deadlines set forth in the

[1] Alberto Gonzales is substituted for John Ashcroft pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

Initial Scheduling Order pending the outcome of Defendants' petition for certiorari.

This case is before the Court in a highly unusual posture. Plaintiffs' complaint, which alleged that Defendants violated the Religious Freedom Restoration Act by applying the Controlled Substances Act to prohibit Plaintiffs' importation and religious use of the controlled substance "hoasca," was filed on November 21, 2000. Plaintiffs moved for a preliminary injunction on December 22, 2000. After briefing on the motion for a preliminary injunction, the Court ordered an evidentiary hearing to take place in late October of 2001. The parties engaged in extensive discovery over a period of several months. The evidentiary hearing lasted for two weeks; it involved testimony from 19 witnesses, including 12 witnesses designated by the parties as experts, and thousands of pages of exhibits. The Court issued a preliminary injunction in November of 2002, two years after the case was filed. Defendants appealed the preliminary injunction; a divided panel of the Court of Appeals for the Tenth Circuit upheld the preliminary injunction on September 4, 2003. The Court of Appeals then agreed to rehear the appeal *en banc*, and upheld the preliminary injunction in a deeply divided decision issued on November 12, 2004. Defendants filed a petition for certiorari with the Supreme Court on February 10, 2005.

Given that the preliminary injunction has been on appeal since November of 2002, it appears that it was Plaintiffs' motion to schedule a trial, rather than anything inherent in the posture of the case, which triggered the issuance of the Initial Scheduling Order. Plaintiffs, however – whose religious use of hoasca is now protected by the preliminary injunction – gave no reason for their

request to move forward with a trial at this particular time, noting only that the Court retains jurisdiction to hold a trial on the merits pending the appeal of a preliminary injunction. While Plaintiffs are correct that a trial on the merits *may* be held pending the appeal of a preliminary injunction, there is certainly no rule that a trial on the merits *must* proceed during the appeal, nor is there any default presumption in favor of doing so. Indeed, throughout the lengthy appeal process in this case – which is now in its final stage – neither the parties nor the Court have attempted to move forward with a trial on the merits, choosing instead to await the outcome of the appeal process. Given the circumstances of this particular case, the course that the parties and the Court have followed thus far is the preferable one.

As noted above, the record below is unusually extensive for a preliminary injunction, and the issues presented on appeal are correspondingly comprehensive. Should the Supreme Court grant Defendants' petition for certiorari, the Supreme Court's resolution of these issues will at a minimum determine the proper scope of any trial on the merits, and could even obviate the need for such a trial. For example:

- Defendants have argued that Congress's placement of a substance on Schedule I of the Controlled Substances Act reflects a legislative finding of harmfulness and abuse potential that, on its own, satisfies the government's burden under the Religious Freedom Restoration Act. If the Supreme Court were to agree with this argument, there would be no need for any trial on the merits.

- Defendants have argued, in the alternative, that evidentiary "equipoise" – as the District Court described the evidence below – is sufficient, when combined with Congress's findings, to sustain the government's burden under the Religious Freedom Restoration Act. The Supreme Court's resolution of this question, and its clarification of the proper evidentiary standard where legislative findings are at issue, will have obvious ramifications for the amount and type of any further evidence Defendants may wish to submit. (For example, if evidentiary "equipoise" is sufficient, Defendants may choose simply to rest on the record below.)

- Plaintiffs have argued, and the District Court held, that the 1971 Convention on Psychotropic Substances does not prohibit Plaintiffs' importation and use of hoasca. If the Supreme Court were to uphold this interpretation, there would be no need for any evidence regarding the government's compelling interest in compliance with the Convention. If the Supreme Court were to reject this interpretation and proceed to address the government's interest in compliance, then its treatment of this issue would determine what further proceedings, if any, would be necessary.

In short, the parties cannot know the extent and contours of any trial on the merits – or, indeed, whether a trial on the merits is even necessary – until they know whether and/or how the Supreme Court will resolve the issues before it. Absent that knowledge, the parties may spend significant resources over the next few months on pre-trial preparation, much or even all of which could

prove wholly unnecessary. Furthermore, the Court could end up expending its own resources on an unnecessary trial.

Plaintiffs will suffer no prejudice from waiting for this final avenue of appellate review to be exhausted. The District Court granted the preliminary injunction and the Supreme Court denied Defendants' request to stay the preliminary injunction pending the certiorari process. Plaintiffs are thus free to import hoasca and to practice their religion while the Supreme Court considers Defendants' petition. On the other hand, both Defendants *and Plaintiffs* may be significantly prejudiced by moving forward with a trial on the merits at this time, given that preparing for trial without the benefit of knowing the proper scope of that trial is quite likely to result in unnecessary expenditures of time, effort, and money by the parties. Under these circumstances, it clearly is the better course of action – and well within the Court's discretion as a matter of case management – to continue to wait until final resolution of the matters on appeal before proceeding to a trial on the merits.

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' motion for a scheduling conference and grant Defendants' motion to postpone the deadlines in the Initial Scheduling Conference pending completion of the appeal process. In the alternative, if the Court is inclined to move forward with a trial on the merits at this time, Defendants respectfully request a thirty-day postponement of the deadlines set forth in the Initial Scheduling Order. The reasons for this request are that (1) undersigned counsel has an unusually burdensome litigation schedule between now and March 4, 2005; and (2) extensive consultation among affected

government agencies will be necessary to determine the evidence Defendants may wish to present, particularly given the uncertainties resulting from the ongoing appeal process.

Defendants' counsel has consulted with Plaintiffs' counsel regarding this motion. Plaintiffs oppose Defendants' request to postpone pre-trial activities pending completion of the appeal process. However, if the Court denies that request, Plaintiffs would not object to Defendants' request for a one-month extension of the deadlines set forth in the Initial Scheduling Order, as long as the scheduling conference is held no later than April 8, 2005 (after which time Plaintiffs' counsel would have scheduling conflicts).

Dated: February 10, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DAVID C. IGLESIAS
United States Attorney
for the District of New Mexico

VINCENT M. GARVEY
Deputy Branch Director

/s/ Liza Goitein
ELIZABETH GOITEIN
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Combined Motion to Extend Deadlines in Initial Scheduling Order/Opposition to Motion for Scheduling Conference was served this 10th day of February, 2005, by electronic mail, upon counsel for the plaintiffs as follows:

Nancy Hollander and John W. Boyd
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& Cline, P.A.
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/s/ Liza Goitein
ELIZABETH GOITEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

O CENTRO ESPIRITA
BENEFICIENTE UNIAO
DO VEGETAL, *et al.*,

Plaintiffs,

vs. No. CV 00-1647 JP/RLP

JOHN ASHCROFT, *et al.*,

Defendants.

DECLARATION OF THE HONORABLE HERBERT S. OKUN

1. My name is Herbert S. Okun. From 1992 until May, 2002, I served as the United States member of the United Nations International Narcotics Control Board (INCB). I served in the Foreign Service of the United States of America from 1955 to 1991. Among other positions, I served as Ambassador to the German Democratic Republic, 1980-1983, and as Deputy Permanent Representative and Ambassador to the United Nations, 1985-1989. My other diplomatic, professional and academic positions are set forth in my biography contained in *Who's Who in America, 2001*, which is attached as exhibit A to this declaration. The *Who's Who* entry is correct except that I am no longer a member of INCB.

2. INCB is the international community's independent and quasi-judicial control organ for the monitoring and implementation of the three international drug control conventions, one of which is the United Nations Convention on Psychotropic Substances, 1971.

3. INCB was established in 1968 by the Single Convention on Narcotic Drugs of 1961, and had predecessor

organizations going back to the early part of the 20th Century. One of the responsibilities of INCB is to promote the compliance of governments with the provisions of the international drug control conventions and to assist them in this effort.

4. INCB is widely acknowledged as a principal authority in interpreting the Conventions when questions arise about them. In doing so, INCB regularly consults with the Scientific Section and the Legal Advisory Section of the United Nations Office of Drugs and Crime (previously known as the United Nations International Drug Control Programme).

5. The Commentary to the United Nations Convention on Psychotropic Substances, 1971, is the principal written instruction regarding its interpretation. The Commentary is an official document and provides authoritative guidance to Parties in meeting their obligations under the Conventions, consistent with national laws and policies.

6. I have read the letter from Mr. Herbert Schaepe, Secretary of INCB, to Mr. Lousberg of the Ministry of Public Health, The Netherlands, dated 17 January, 2001, which is attached as exhibit B to this declaration. The substance of that letter is consistent with my understanding of the United Nations Convention on Psychotropic Substances, 1971, and the official Commentary to that Convention.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed this 7 day of December, 2002, at Geneva, Switzerland.

/s/ Herbert S. Okun
The Honorable Herbert S. Okun

EXHIBIT A

OKUN, HERBERT STUART, diplomat, educator; b. N.Y.C., Nov. 27, 1930; s. Irving and Ida Muriel (Levine) O.; m. Lorraine Joan Price, Dec. 5, 1954 (div. 1985); children: Jennifer, Elizabeth, Alexandra; m. Enid Curtis Bok Schoettle, Dec. 27, 1990. AB with gt. distinction, Stanford U., 1951; postgrad., Syracuse U., 1951-52, Princeton U., 1952; Hochschule fuer Politische, Wissenschaft, Munich, Fed. Republic of Germany, 1956-57; MPA, Harvard U., 1959. Mem. U.S. Fgn. Service, 1955-91; vice consul U.S. Fgn. Service, Munich, Fed. Republic Germany, 1955-57; with Bur. Intelligence and Rsch., Dept. State Office Soviet Union Affairs, Washington, 1959-61, alt. dir., 1971-73; 2d sec. Am. Embassy, Moscow, 1961-63; consul, prin. officer Am. Consulate, Belo Horizonte, Brazil, 1964-65; 1st sec., prin. officer Am. Embassy, Brasilia, Brazil, 1965-66, counsellor embassy, prin. officer, 1967-68; assigned to Naval War Coll., 1968-69; spl. asst. to sec. of state Dept. State, Washington, 1969-71, dep. chmn. U.S. Del., U.S.-USSR Talks on Prevention Incidents at Sea, 1971-72; spl. asst. for internat. affairs to comdr.-in-chief NATO So. Command, Naples, Italy, 1973-74; min.-counsellor, dep. chief mission Am. Embassy, Lisbon, Portugal, 1975-78; dep. chmn. U.S. del. Strategic Arms Limitation Talks with Soviet Union, Geneva, 1978-79; vice chmn. U.S. del. to trilateral U.S.-U.K.-USSR Talks on comprehensive test ban treaty, Geneva, 1979-80; ambassador to German Democratic Republic East Berlin, 1980-83; amb.-in-residence Aspen Inst., Washington, 1983-85; amb., dep. permanent rep. of U.S. to the UN N.Y.C., 1985-89; rep. of U.S. to 40th, 41st, 42d and 43d sessions of Gen. Assembly of UN, to UN Security Coun., 1985-89, to 29th and 30th sessions of Com. on Peaceful Uses of Outer Space, 1986,

87, to Disarmament Commn. of UN, 1985-89, to Commn. Human Rights, to 27th and 29th session of com. on program and coordination of Econ. and Social Coun., 1987, 89; amb. in residence Carnegie Corp. of N.Y., 1989-90; mem. UN Sec. Gen's. Expert Group on Enhancing UN Structure for Drug Abuse Control, 1990; founding exec. dir. Fin. Svcs. Vol. Corps, N.Y.C., 1990-97; vis. lectr. Yale Law Sch., New Haven, 1991 - ; spl. adviser to the personal envoy of the sec. gen. UN, Yugoslavia and Nagorno-Karabakh, 1991-92; spl. adv., dep. co-chmn. Internat. Conf. on former Yugoslavia, 1992-93; UN mediator Dispute between Greece & former Yugoslav Republic of Macedonia, 1993-97; U.S. mem. UN Internat. Narcotics Control Bd., Vienna, Austria, 1992- ; adv. bd. Chazen Inst. Internat. Bus. Grad. Sch. Bus., Columbia U.; mem. bd. dirs. World Rehab. Fund; mem. adv. bd. Minority Rights Group U.S.A.; spl. advisor Carnegie Commn. on Preventing Deadly Conflict. Commr. U.S.-Poland Action Commn; mem. Internat. Coun., Found. Inter-Ethnic Rels., The Hague, The Netherlands, 1995- , mem. Adv. Com., Human Rights Watch, N.Y., 1995- ; mem. group internat. advisors Internat. Com. Red Cross, Geneva, 1996-2000; bd. overseers Curtis Inst. Music., Phila.; adv. bd. internat. security studies Yale U., New Haven; mem. adv. bd. Portuguese-Am. Leadership Coun. U.S. Served with AUS, 1952-54. Recipient Meritorious Honor award Dept. of State, 1972, Superior Honor award Dept. of State, 1980, Presdl. Meritorious Svc. award, 1983. Mem. Am. Fgn. Svc. Assn., Am. Fgn. Policy (nat. com.), Am. Acad. Diplomacy, Lawyers Alliance World Security (nat. bd. dirs.), Washington Inst. Fgn. Affairs, Phi Beta Kappa. Home: 1133 Park Ave New York NY 10128-1246

EXHIBIT B

INCB [LOGO] OICS

UNITED NATIONS
INTERNATIONAL
NARCOTICS
CONTROL BOARD

NATIONS UNIES
ORGANE INTERNATIONAL DE
CONTROLE DES STUPEFIANTS

[Address Omitted In Printing]

To:	Mr. Lousberg, Chief	Date:	17 January 2001
Address:	Inspectorate for Health Care Ministry of Public Health Den Haag – The Netherlands	Ref.: File:	INCB-PSY 10/01 141/1 NET
Fax No.:	00031-70-340 71 59	No. of Pages:	1
From:	Herbert Schaepe, Secretary International Narcotics Control Board		
Subject:	International control of the preparation "ayahuasca"		

Dear Mr. Lousberg,

I would like to refer to your facsimile of 20 December 2000 concerning the traditional use of controlled substances, in particular the use of a preparation called "ayahuasca" by religious groups in the Netherlands.

The above mentioned issue was consulted by the INCB Secretariat with the Scientific Section and the Legal Advisory Section of the United National International Drug Control Programme (UNDCP). It is our understanding that "ayahuasca" is the common name for a liquid preparation (decoction) for oral use prepared from plants indigenous to

the Amazon basin of South America, essentially the stem bark of different species of a jungle vine (Banisteriopsis sp.) and the tryptamine-rich plant Psychotria viridis. According to the scientific literature, ayahuasca commonly contains a number of psychoactive alkaloids, including DMT which is a substance included in Schedule I of the 1971 Convention on Psychotropic Substances.

No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention.

Yours sincerely,

/s/ Herbert Schaepe
Herbert Schaepe
Secretary of the Board

COMMENTARY on the CONVENTION ON PSYCHOTROPIC SUBSTANCES

Done at Vienna on 21 February 1971

[LOGO]

UNITED NATIONS

NOTE

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* * *

FOREWARD

This Commentary was prepared as a project of the United Nations Fund for Drug Abuse Control and was financed by that Fund. It was written by Mr. Adolf Lande, former Secretary of the Permanent Central Narcotics Board and Drug Supervisory Body, under the responsibility of the United Nations Office of Legal Affairs.

* * *

2. Parties may subject to time-limits or other restrictions reservations which they make under article 32.

3. All reservations can be made only at the time of signature, ratification or accession, although this is expressly stated only in respect of reservations pursuant to paragraphs 2 and 4, but not in respect of those under paragraph 3.[1220] A Party may however at any time subject its reservation to a time-limit or other restriction since this amounts to withdrawing a part of its reservation, which under paragraph 5 it may do at any time.

4. In conformity with the corresponding paragraph 2 of article 50 of the Single Convention, paragraph 2 of article 32 of the Vienna Convention permits unilateral reservations in respect of provisions[1221] requiring the Convention's application to non-Parties by the Board or by Parties, and in respect of the article concerning the settlement of disputes. Contrary to the paragraph of the Single Convention, the paragraph of the Vienna Convention also authorizes a unilateral reservation on the article dealing with "territorial application".

[1220] Article 19, introductory paragraph of the Convention on the Law of Treaties, document A/CONF.39/27; see also *1961 Commentary*, paragraph 4 of the comments on article 50 of the Single Convention (p. 476); the time for making reservations at the time of signature expired under article 25, paragraph 2 on 1 January 1972.

[1221] Article 19, paragraphs 1 and 2 of the Vienna Convention which is applicable also to non-Parties corresponds to article 14, paragraphs 1 and 2 of the Single Convention in respect of which unilateral reservations are permitted under article 50, paragraph 2 of the latter Convention.

5. Paragraph 4 gives rise to some questions. Plants as such are not, and – it is submitted – are also not likely to be, listed in Schedule I, but only some products obtained from plants. Article 7 therefore does not apply to plants as such from which substances in Schedule I may be obtained, nor does any other provision of the Vienna Convention. Moreover, the cultivation of plants from which psychotropic substances are obtained is not controlled by the Vienna Convention.[1222] It appears to be clear from the proceedings of the 1971 Conference that what is meant by the word "plants" when it occurs in paragraph 4 for a second time is not the whole plants, but only those parts or products of the plants concerned which may be listed in Schedule I.

6. It appears also to be obvious from the proceedings of the 1971 Conference and from the purpose of paragraph 2[1223] that a Party can by a unilateral reservation free itself from its obligation to apply provisions of article 7 to the plant parts or products in question only to the extent that would be required for making possible legal use in the magical or religious rites to which paragraph 4 refers.

7. The Mexican Indian Tribes Mazatecas, Huicholes and Tarahumaras were mentioned at the 1971 Conference as examples of the groups to which [386] paragraph 4

[1222] Paragraph 4 of the general comments on article 1 and paragraph 15 of the comments on article 1, paragraph *(i)*.

[1223] *1971 Records*, vol. II, paragraphs 12 to 14 of the summary records of the twenty-fifth plenary meeting (pp. 106 to 107).

refers. The Kariri and Pankararu of eastern Brazil would be other examples.[1224]

8. The use in the magical or religious rites mentioned in the paragraph under consideration must be "traditional", that is, it must have been practised for a considerable period of time. It must also actually exist at the time at which the reservation is made, although it may at that time be formally illegal under domestic law.

9. In accordance with the view proffered in paragraph 6 of the present comments, only the following exemptions from the application of article 7, paragraphs *(a)* to *(e)*[1225] can be obtained by a Party making a reservation according to the paragraph under consideration:

(a) Only the use by members of the "clearly determined groups" in the magical or religious rites in question, and no other use even by those members, may be freed from the requirement to limit the use of substances in Schedule I to scientific and very limited medical purposes under the conditions of article 7, paragraph *(a)*;

(b) Only the "manufacture", trade, distribution and possession of the substance in question by members of the "clearly determined groups" and only such activities and possession for use in the magic or religious rites concerned could be exempted from the obligation to require a "special licence or prior authorization", to exercise close supervision,

[1224] Brecher, Edward and the Editors of Consumer Reports, Licit and Illicit Drugs, Mount Vernon, New York, Consumers Union, 1972, p. 344.

[1225] Paragraph *(f)* deals with the international trade.

to restrict supplies and to require the keeping of records pursuant to article 7, paragraphs *(b)* to *(e)*; and

(c) Freedom from the obligation to apply the controls of article 7, paragraphs *(a)* to *(e)* can by a reservation under paragraph 4 be gained only in regard to substances obtained from plants growing wild. It is however submitted that Parties may for practical reasons and in accordance with the spirit and purpose of paragraph 4 wish to include in the exemption from those controls also substances obtained from plants cultivated by members of the "clearly determined groups" on their own land or on that of their tribes for use in the magical or religious rites concerned.

10. Paragraph 4 does not refer to article 11, paragraph 1 nor to article 16, paragraph 4, subparagraph *(a)*. It is however submitted that a Party would also be freed from the obligation to require under article 11, paragraph 1 the keeping of records in respect of activities covered by its reservation made under article 32, paragraph 4. It appears also to be obvious that the reserving Party would be unable to include in its statistical reports pursuant to article 16, paragraph 4, subparagraph *(a)* the amounts of substances "manufactured" by members of the "clearly determined groups" for use in the magical or religious rites concerned or the amounts held in stock by such "manufacturers" for that purpose.

[387] 11. It is suggested that a reservation under article 32, paragraph 4 should clearly indicate the substance in Schedule I, the groups of users, the magical or religious rite and the method of consumption which it is intended to cover.

12. It may be pointed out that at the time of this writing the continued toleration of the use of hallucinogenic substances which the 1971 Conference had in mind would not require a reservation under paragraph 4. Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which constitute the active principles contained in them.[1226] The inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle. This view is in accordance with the traditional understanding of that question in the field of international drug control. Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant Mimosa hostilis[1227] nor Psilocybe mushrooms[1228] themselves are included in Schedule I, but only their respective active principles, mescaline, DMT and psilocybine (psilocine, psilotsin).

13. It can however not be excluded that the fruit of the Peyote cactus, the roots of Mimosa hostilis, Psilocybe mushrooms or other hallucinogenic plant parts used in traditional magical or religious rites will in the future be placed in Schedule I by the operation of article 2, at a time at which the State concerned, having already deposited its instrument of ratification or accession, could no longer make the required reservation. It is submitted that Parties may under paragraph 4 make a reservation assuring them the right to permit the continuation of the traditional use in

[1226] *1971 Records*, vol. ii, paragraph 45 of the summary records of the twenty-fifth plenary meeting (p. 108).

[1227] An infusion of the roots is used.

[1228] Beverages made from such mushrooms are used.

question in the case of such future actions by the Commission.

14. Parties which wish to obtain the same assurance in cases in which the substance concerned is in the future placed in another Schedule than Schedule I would have to make an appropriate reservation under paragraph 3.

15. A State which desires to become a Party with a reservation which requires authorization by the procedure pursuant to paragraph 3 must inform the Secretary-General in writing of that desire, with the text of the intended reservation.

16. If during the twelve-month period mentioned in that paragraph the intended reservation has not been objected to by one third or more of the States that have accepted the Convention,[1229] the State concerned could then at the time of its ratification of, or accession[1230] to, the treaty validly make the authorized reservation.

[1229] Article 25.

[1230] The period for signing has expired at the time of this writing; article 25, paragraph 2.

* * *

COMMENTARY ON THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

1988

Done at Vienna on 20 December 1988

[LOGO]
UNITED NATIONS

NOTE

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* * *

FOREWORD

Origin of the Commentary

Recalling that the earlier commentaries – on the Single Convention on Narcotic Drugs of 1961, on the 1972 Protocol amending that Convention and on the Convention on Psychotropic Substances of 1971 – were of considerable

value to a number of Governments as a guide in framing legislative and administrative measures for the application of those conventions, the Economic and Social Council, in its resolution 1993/42 requested the Secretary-General to prepare a commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which had then been in force for almost three years. In similar requests for the earlier commentaries, the Council had underlined their potential usefulness in ensuring a more uniform interpretation of the treaties. In its request for the present *Commentary,* the Council specified that the work should be of assistance to States not only in their interpretation of the 1988 Convention but also in their effective implementation of it. The present *Commentary,* therefore, has been organized along somewhat different lines than its predecessors, and the drafting procedure also called for a different approach.

The body of most of the text was first prepared by four principal drafters: Henri Mazaud, former Assistant Director of the Division of Human Rights of the United Nations Secretariat in charge of international instruments and procedures, and John F. Scott, former Director of the Office of Legal Counsel and Deputy Director to the Under-Secretary-General for Legal Affairs of the United Nations Secretariat, both of whom had acted as legal consultants to the plenipotentiary conference that adopted the Convention, William C. Gilmore, Professor of International Criminal Law at the University of Edinburgh, and David McClean, Q.C., Professor, Department of Law of the University of Sheffield. Their invaluable contribution to this *Commentary* is hereby acknowledged with thanks.

The evolving texts on various technical articles were routinely submitted for comment and evaluation to a broad cross-section of government experts from all geographical regions, many of whom had participated in the drafting process of the Convention and had attended the plenipotentiary conference. In addition, particularly with regard to the comments on articles 12, 13 and 16, the views of the secretariat of the International Narcotics Control Board were greatly appreciated.

The multidisciplinary approach adopted, required by the very nature of the contents of the Convention, was further enhanced at a number of expert review groups that were convened by the Legal Affairs Section of the United Nations International Drug Control Programme, which constantly revised and completed the manuscript. The Legal Affairs Section also liaised throughout the drafting process with the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat.

Overall coordination of the project and supervision of the manuscript was ensured by Paulsen K. Bailey, the former Secretary of the Commission on Narcotic Drugs for many years who had served as Secretary of the Conference and of its General Committee and Committee I.

Lastly, thanks are due to all others – too numerous to mention individually – who contributed in various ways to the successful completion of the long and meticulous task of drafting and reviewing the *Commentary* and preparing it for publication.

Structure of the Commentary

The *Commentary* is divided into five functional parts in addition to the "Introduction", which gives an overview

of the genesis of the 1988 Convention from its conception by the General Assembly in December of 1984 to its adoption at the plenipotentiary conference in December of 1988.

"Part One", entitled "General Provisions", covers the Preamble, article 1 ("Definitions") and article 2 ("Scope of the Convention"). Although the Preamble of the Convention is not of the same legal significance as one of its articles, its perusal, together with that of article 2, provides a sound background for an understanding of the objectives of the Convention and, with article 1, a general introduction to its subject matter.

The titles of the remaining four parts are self-explanatory. Thus, "Part Two", entitled "Substantive Provisions", covers articles 3-19, the substantive or technical articles, many of which are self-contained mini-treaties on particular topics. The roles of the Commission on Narcotic Drugs and the International Narcotics Control Board and the reporting requirements of parties, to ensure proper implementation of the Convention, are the subjects of "Part Three", entitled "Implementation Provisions". "Part Four", entitled "Final Clauses", explains the standard provisions included in many multilateral conventions to regulate such technicalities as becoming a party to or amending the Convention. The annex to the Convention, which lists the substances governed by the provisions of article 12, is the subject of "Part Five".

Background information on the "final clauses" as adopted and on the matter of reservations to and territorial application of the Convention (issues not explicitly dealt with) is included in two annexes to the *Commentary*.

A particular and distinctive feature of the present *Commentary* arises from the request of the Economic and Social Council that it should be directly useful to parties in their effective implementation of the provisions of the Convention. This has led, in addition to the exegesis of the final text as adopted, a standard feature in legal commentaries, to the inclusion, where appropriate, of a section or sections entitled "Implementation considerations". These considerations reflect government practices with respect to the matter under examination or examples of practical application measures in use or recommended by various government agencies or authoritative international bodies. Because of the nature of the contents of the articles, such considerations are limited to articles 3-19, i.e. "Part Two", on "Substantive Provisions". Depending on the internal content of each article, the consideration may apply to an article as a whole or to various subsections.

Finally, the paragraph numbering system used in this *Commentary* calls for a brief explanation. Each chapter begins with a new series of paragraph numbers, the first digit or digits of which reflect the article number (for example, the chapter on article 7 begins with paragraphs 7.1, 7.2 etc., and the chapter on article 19 runs from paragraph 19.1 to paragraph 19.24). This facilitates reference to any given paragraph by obviating the need to refer to a section or chapter and immediately identifies the article in question. To accommodate this general system, some exceptions needed to be made: the paragraphs in the "Introduction" are numbered 1, 2 etc.; the paragraphs in the "Preamble" are numbered 0.1, 0.2 etc.; and the section entitled "Attestation clause and concluding paragraph" and "Part Five", on Table I and Table II, annexed to the Convention, use, respectively, 35 and 36 as prefix digits in

the paragraph numbers (since the last numbered article is article 34). The annexes follow a similar system. It is hoped that the reader and those reviewing or commenting on the content matter of the *Commentary* will find the system helpful and easy to use.

* * *

[54] *Art. 3 – Offences and sanctions.*

transformation of psychotropic substances into other psychotropic substances . . . [and] also . . . the making of preparations other than those made on prescription in pharmacies".[123] These definitions are fully discussed in the commentaries on the earlier conventions.[124]

"Extraction"

3.16 The term "extraction" was used in the 1961 Convention without definition. Extraction is the separation and collection of one or more substances from a mixture by whatever means: physical, chemical or a combination thereof.

"Preparation"

3.17 The 1961 Convention contains a definition of the word "preparation",[125] but the definition refers to the noun

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[123] 1971 Convention, art. 1, subpara. (*i*). "Preparation" is defined in article 1, subparagraph (*f*); but see the discussion of that word in paragraphs 3.17 and 3.18 below.

[124] Commentary on the 1961 Convention, comments on article 1, paragraph 1, subparagraph (*n*); and Commentary on the 1971 Convention, comments on article 1, subparagraph (*i*).

[125] "A mixture, solid or liquid, containing a drug" (1961 Convention, art. 1, para. 1, subpara. (*s*)).

(used in a number of articles of the 1961 Convention)[126] denoting the result of a process rather than the process itself of preparing something. Accordingly, the definition in the 1961 Convention can be ignored for present purposes.

3.18 "Preparation", also referred to as "compounding", denotes the mixing of a given quantity of a drug with one or more other substances (buffers, diluents), subsequently divided into units or packaged for therapeutic or scientific use. This understanding is supported by the sequence of words used: "preparation" comes immediately before "offering" and "offering for sale".

"*Offering*" and "*Offering for sale*"

3.19 The similarity of the terms "offering" and "offering for sale", which makes it convenient to examine them together, may be misleading. In the French text no such similarity appears, and *l'offre* can be contrasted with *la mise en vente.*

3.20 "To offer" something is to hold it out, or make it available, so that another may receive it. Although providing a person with narcotic drugs or

* * *

[126] For example, article 2, paragraphs 3 and 4.

[Translation from French]

CASE No. 04/01888
JUDGEMENT OF JANUARY, 13 2005
10TH CHAMBER, SECTION B

Excerpt from the original documents of the Secretariat – Clerk of the Court of Appeals of Paris

COURT OF APPEALS OF PARIS

10th Chamber, Section B
(No. 1, 19 pages)

Delivered publicly on THURSDAY JANUARY 13, 2005 by the 10th Chamber of Criminal Appeals, Section B,

Upon appeal of a judgment by the 16th CHAMBER of the TRIBUNAL DE GRANDE INSTANCE DE PARIS on JANUARY 15, 2004 (P9828602936).

PARTIES TO THE CASE BEFORE THE COURT OF APPEALS:

BAUCHET, Claude, born on June 14, 1947 in Mouseuil Saint Martin, Vendée (085), Son of Michel Bauchet and Gisèle Bernarest.
of French nationality, unknown marital status, business executive.
Residing at 7, rue Auguste Rey
95390 St. Prix
Defendant, appearing,
Appellant, on probation (Remand Order 135 of November 19, 1999, Released on probation on December 10, 1999).

Jean-Pierre Joseph, attorney at the Bar of Grenoble, and Mr. Caballero, attorney at the Bar of Paris, filing pleadings signed by the Presiding Judge and the Clerk and appended to the file.

BOUVIER D'YVOIRE, Anne, born on July 25, 1954 in Boulogne Billancourt, Hauts-de-Seine (092),
Daughter of Maurice Bouvier d'Yvoire and Marguerite Maudre.
of French nationality, unknown marital status, school teacher.
Residing at 17, rue Constance
75118 Paris
Defendant, appearing,
Appellant, on probation (Remand Order 135 of November 19, 1999, Released on probation on December 6, 1999).

Represented by Ms. Atallah, attorney at the Bar of Paris.

FERRIE, Frédéric, born on November 30, 1963 in Longwy, Meurthe-et-Moselle (054), Son of André Ferrie and Geneviève Bonnet.
of French nationality, unknown marital status, plasterer.
Residing at 12, Grande Rue, c/o Mrs. Thellier
26000 Valence
Defendant, appearing,
Appellant, free

Represented by Ms. Chantal Hounkpatin, attorney at the Bar of Paris, filing pleadings signed by the Presiding Judge and the Clerk and appended to the file.

SILVEIRA-LAGE, André, born on October 26, 1971 in Coronel Fabriciano (Brazil). Son of Adam Silveira-Lage and Maria d'Anicio.
of Brazilian nationality, single, student.
Residing at 4, rue Roquépine
75008 Paris

Defendant, appearing,
Appellant, on probation (Remand Order 135 of November 19, 1999, Released on probation on December 7, 1999).

Represented by Ms. Ana Atallah, attorney at the Bar of Paris.

VALLADON, Corinne, of married name Zaiontchkovsky, born on February 17, 1964 in Montereau Fault Yonne, Seine-et-Marne (077),
Daughter of Gérard Valladon and Mireille Pincemaille
of French nationality, married, pharmacy dispenser.
Residing at R.D. 104
07260 Rosières

Defendant, appearing,
Respondent, on probation (Probation Order of March 1, 2000).

Represented by Mr. Caballero, attorney at the Bar of Paris, filing pleadings signed by the Presiding Judge and the Clerk and appended to the file.

ZAIONTCHKOVSKY, Alexis, born on May 25, 1960 in Paris, 15th Arrondissement, Paris
(075),
Son of Igor Zaiontchkovsky and Micheline Grappini of
French nationality, married, sales clerk.
Residing at R.D. 104
07260 Rosières

Defendant, appearing,
Respondent, on probation (Probation Order of March 1, 2000).

Represented by Mr. Caballero, attorney at the Bar of Paris, filing pleadings signed by the Presiding Judge and the Clerk and appended to the file.

OFFICE OF THE PUBLIC PROSECUTOR appellant,

COMPOSITION OF THE COURT during the proceedings and deliberations

Presiding Judge:	Mr. Gouyette
Judges:	Mr. Beauguitte
	Mrs. Maligner-Peyron

CLERK: Ms. Tahar, during the proceedings

OFFICE OF THE PUBLIC PROSECUTOR: represented at the proceedings by Mr. Thin, District Attorney

BACKGROUND OF PROCEEDINGS

CHARGES

Claude BAUCHET, Anne BOUVIER D'YVOIRE, Frédéric FERRIE, André SILVEIRA-LAGE, Corinne VALLADON ZAIONTCHKOVSKY, [and] **Alexis ZAIONTCHKOVSKY** were prosecuted by remand order before the Criminal Court on July 1, 2003 for having:

in Paris, Valence, on national territory and in any case during a period not barred by statute of limitation from 1997 until November 1999, acquired, imported, possessed, offered, sold and used narcotic[1] products, in this case Daime, a decoction containing DMT, which has been classified as a narcotic since 1990; in the case of **Claude Bauchet**, for having it brought from Brazil and for possessing it on the premises where the rituals took place; **Alexis Zaiontchkovsky** for personally undertaking to supply the Daime, his wife handling the association's financial and administrative management, they being assisted and then replaced by **Frédéric Ferrie**; **André Silveira-Lage**, for importing at least 100 liters of this

[1] TN: *stupéfiant* in the general sense of a controlled drug (cf. reference to UN International Narcotics Control Board on p. 14 of this judgment), not in the more narrow pharmacological sense of a depressant or analgesic. These distinctions are made herein on p. 16.

product for the Paris group; **Anne Bouvier d'Yvoire** for being in charge of set-up of the rituals.

JUDGMENT

The Tribunal de Grande Instance de Paris, in its January 15, 2004 judgment following *inter partes* proceedings, pronounced:

BAUCHET, Claude guilty of UNAUTHORIZED ACQUISITION OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED IMPORTATION OF NARCOTICS – TRAFFICKING from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-36 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-36 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED POSSESSION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable

under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED OFFERING OR SALE OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of ILLICITE USAGE OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles L. 3421-1 [and] L. 5132-7 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles L. 3421-1, L. 3424-2 Section 1, L. 3421-2, L. 3421-3 of the Public Health Code, [and] Article 222-49 Section 1 of the Penal Code.

BOUVIER D'YVOIRE, Anne, guilty of UNAUTHORIZED ACQUISITION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED IMPORTATION OF NARCOTICS – TRAFFICKING from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-36 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-36 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED POSSESSION OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED OFFERING OR SALE OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of ILLICITE USAGE OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles L. 3421-1 [and] L. 5132-7 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles L. 3421-1, L. 3424-2 Section 1, L. 3421-2, L. 3421-3 of the Public Health Code, [and] Article 222-49 Section 1 of the Penal Code.

FERRIE, Frédéric guilty of UNAUTHORIZED ACQUISITION OF NARCOTICS from 1997 until November 1999 in Paris – Valence, an offence under Articles 222-37

Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED IMPORTATION OF NARCOTICS – TRAFFICKING from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-36 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-36 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED POSSESSION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED OFFERING OR SALE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of ILLICITE USAGE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles L. 3421-1 [and] L. 5132-7 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles L. 3421-1, L. 3424-2 Section 1, L. 3421-2, L. 3421-3 of the Public Health Code, [and] Article 222-49 Section 1 of the Penal Code.

SILVEIRA-LAGE, André guilty of UNAUTHORIZED ACQUISITION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED IMPORTATION OF NARCOTICS – TRAFFICKING from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-36 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-36 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED POSSESSION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47,

222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED OFFERING OR SALE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of ILLICITE USAGE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles L. 3421-1 [and] L. 5132-7 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles L. 3421-1, L. 3424-2 Section 1, L. 3421-2, L. 3421-3 of the Public Health Code, [and] Article 222-49 Section 1 of the Penal Code.

VALLADON ZAIONTCHKOVSKY, Corinne guilty of UNAUTHORIZED ACQUISITION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED IMPORTATION OF NARCOTICS – TRAFFICKING from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-36 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health

Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-36 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED POSSESSION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED OFFERING OR SALE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of ILLICITE USAGE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles L. 3421-1 [and] L. 5132-7 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles L. 3421-1, L. 3424-2 Section 1, L. 3421-2, L. 3421-3 of the Public Health Code, [and] Article 222-49 Section 1 of the Penal Code.

ZAIONTCHKOVSKY, Alexis, guilty of UNAUTHORIZED ACQUISITION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under

Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED IMPORTATION OF NARCOTICS – TRAFFICKING from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-36 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-36 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED POSSESSION OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of UNAUTHORIZED OFFERING OR SALE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles 222-37 Section 1, 222-41 of the Penal Code, Articles L. 5132-7, L. 5132-8 Sect. 1, R. 5171, R. 5172 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles 222-37 Section 1, 222-44, 222-45, 222-47, 222-48, 222-49 Section 1, 222-50, [and] 222-51 of the Penal Code;

guilty of ILLICITE USAGE OF NARCOTICS from 1997 until November 1999 in Paris – Valence TN, an offence under Articles L. 3421-1 [and] L. 5132-7 of the Public Health Code, Article 1 of the Ministerial Order of February 22, 1990 and punishable under Articles L. 3421-1, L. 3424-2 Section 1, L. 3421-2, L. 3421-3 of the Public Health Code, [and] Article 222-49 Section 1 of the Penal Code.

And pursuant to these articles, convicted

Claude Bauchet to a suspended sentence of 8 months in prison and ordered confiscation of the property under seal;

Anne Bouvier d'Yvoire to a suspended sentence of 4 months in prison and ordered confiscation of the property under seal;

Frédéric Ferrie to a suspended sentence of 6 months in prison and pronounced confiscation of the property under seal;

André Silveira-Lage to a suspended sentence of 8 months in prison and pronounced confiscation of the property under seal;

Corinne Valladon Zaiontchkovsky to a suspended sentence of 4 months in prison and pronounced confiscation of the property under seal;

Alexis Zaiontchkovsky to a suspended sentence of 10 months in prison and pronounced confiscation of the property under seal.

APPEALS

Appeals were lodged by:

Anne Bouvier d'Yvoire on January 21, 2004 regarding the criminal rulings; The Public Prosecutor on January 21, 2004 against Anne Bouvier d'Yvoire;

Claude Bauchet on January 21, 2004 regarding the criminal rulings; The Public Prosecutor on January 21, 2004 against Claude Bauchet,;

André Silveira-Lage on January 23, 2004 regarding the criminal and civil rulings; The Public Prosecutor on January 23, 2004 against André Silveira-Lage;

Alexis Zaiontchkovsky on January 23, 2004 regarding the criminal rulings;

Frédéric Ferrie on January 23, 2004 regarding the criminal rulings; The Public Prosecutor on January 23, 2004 against Frédéric Ferrie;

The Public Prosecutor on January 26, 2004 against Mr. André Silveira-Lage, Mrs. Anne Bouvier d'Yvoire, Mr. Claude Bauchet, Mr. Alexis Zaiontchkovsky, Mr. Frédéric Ferrie, [and] Mrs. Corinne Valladon.

RECORD OF HEARING

At the public hearing on November 4, 2004, the Presiding Judge established the identity of the defendants.

Judge Maligner-Peyron, gave her oral report;

Claude Bauchet, Anne Bouvier d'Yvoire, Frédéric Ferrie, André Silveira-Lage, Corinne Valladon Zaiontchkovsky and Alexis Zaiontchkovsky briefly presented the grounds for their appeal;

District Attorney Thin, representing the Office of the Public Prosecutor at the court hearing, briefly presented the grounds for the appeal lodged by the Public Prosecutor of Paris;

Claude Bauchet, Anne Bouvier d'Yvoire, Frédéric Ferrie, André Silveira-Lage, Corinne Valladon Zaiontchkovsky and Alexis Zaiontchkovsky were examined;

THE COURT HEARD:

The explanations of Claude Bauchet, Anne Bouvier d'Yvoire, Frédéric Ferrie, André Silveira-Lage, Corinne Valladon Zaiontchkovsky and Alexis Zaiontchkovsky;

The submissions of District Attorney Mr. Thin;

The arguments and pleadings of attorney Mr. Caballero;

The arguments and pleadings of attorney Mr. Joseph;

The arguments of attorney Ms. Atallah;

The arguments and pleadings of attorney Ms. Hounkpatin.

Claude Bauchet, Anne Bouvier d'Yvoire, Frédéric Ferrie, André Silveira-Lage, Corinne Valladon Zaiontchkovsky and Alexis Zaiontchkovsky had the final word.

At the conclusion of this hearing, the Presiding Judge declared to the parties that the matter was submitted for deliberation and that the decision would be rendered on January 13, 2005.

At the January 13, 2005 hearing, the Appeals Court then, after deliberating in accordance with the law, rendered the decision reported below which was read aloud by Presiding Judge Gouyette.

DECISION

Rendered upon deliberation in accordance with the law.

Ruling on the duly lodged:

- Primary appeal by the defendants:
  - Mrs. Anne Bouvier d'Yvoire regarding the criminal rulings,
  - Claude Bauchet regarding the criminal rulings,
  - Alexis Zaiontchkovsky regarding the criminal rulings,
  - Frédéric Ferrie regarding the criminal rulings,
  - André Silveria-Lage [sic] regarding the civil and criminal rulings,
- Cross-appeal by the Office of the Public Prosecutor against Anne Bouvier d'Yvoire, Claude Bauchet, Alexis Zaiontchkovsky, Frédéric Ferrie, Corinne Valladon Zaiontchkovsky and André Silveira-Lage,
- Primary appeal by the Office of the Public Prosecutor against André Silveira-Lage, Anne Bouvier d'Yvoire, Claude Bauchet, Alexis Zaiontchkovsky, Corinne Valladon Zaiontchkovsky and Frédéric Ferrie

of the above-cited judgment which should be referred to regarding the charges and facts in the case.

The Office of the Public Prosecutor supported its appeals, arguing they were justified by the weak sentences imposed in proceedings classified as violations of narcotics legislation, not in the context of free religious practice, but more specifically of common consumption of narcotics, namely a decoction called "Daime" that is obtained

from a maceration of two hallucinogenic plants yielding DMT, a classified narcotic substance.

These violations are particularly serious in that they involve, in exchange for a financial investment, the consumption of narcotic products imported from Brazil by individuals who may have believed in the beneficial effects of this drink and needed this "rite" to reach stages of their existence. Even though the events occurred some time ago, the length of the sentences imposed thus seems inadequate to deter any resurgence of a similar unlawful practice by the defendants or others who may be tempted to commit such offenses on their behalf by qualifying them as religious practices in an attempt to escape criminal responsibility.

The Office of the Public Prosecutor argued before the Appeals Court that the validity of legislation published in the Official Journal on June 7, 1990 cannot seriously be contested, and questioned the admissibility of the appeal on the ground that legislation was illegal.

The lawmaker did not commit any obvious error of interpretation and the facts are not contested, but must be examined in the context of a relatively old framework.

In reply and to contest the decision[s] handed down, defendants filed pleadings and argued:

- Mr. Claude Bauchet, represented by his attorney Jean-Pierre Joseph, that consumption of the preparation called "Ayahuasca" is not prohibited by law and requested that the Appeals Court find that the vine "*Banisteriopsis caapi*" and the leaf called "*Psychotria Viridis*" are not among the products prohibited by law either; that DMT is not prohibited by law in

its natural form but only in synthetic form; and lastly to find that Mr. Claude Bauchet did not import, acquire, use, consume or sell any product prohibited by law.

For charges to be brought, it is not enough simply to show that a product appearing on the list of narcotics exists in the composition of the product seized. It must exist in significant quantity, constitute an essential ingredient of the product, or have been extracted by a chemical process. In the case at hand, an infinitesimal quantity of DMT in its naturally occurring form is found in the formulation called "Santo Daime" or "Ayahuasca," but it is also found in many common plants, particularly bananas and pineapples, and no one would think of prosecuting importers of these fruits.

In the case at hand, the lower court made a significant error in failing to distinguish between two very different processes: extraction of a substance contained in a plant, and decoction.

Lastly, emphasizing that "Ayahusca" [sic] is consumed in the context of a religious ritual, the constitutional principle of religious freedom prevails over certain prohibitions, provided that public health is not threatened.

He plead for the judgment entered to be overturned, there being no legal basis for the prosecution.

– Mr. Frédéric Ferrie also had his attorney file pleadings for reversal of the judgment handed down on the grounds of there being no legal basis for the charges against him, arriving

however at this conclusion by an ostensibly very different intellectual path than the one taken by Bauchet and his attorney.

He argues that "it goes without saying that legislation on the consumption or provision of narcotics cannot be rendered null under a religious guise aimed solely at avoiding the law . . . The pleadings submitted do not sufficiently show that narcotics legislation, as worded, does not apply," and that it "is a recognized fact that DMT is classified as a narcotic and its usage effectively determined by the hallucinogenic effect sought. The distinction between natural DMT and synthetic DMT which [sic] does not arise from the order or other applicable texts and must be disregarded. The legislation does indeed apply to the facts.

He adds, however, that "Ayawasca [sic] is a substance that does not appear in the list of controlled substances in the Public Health Code and does not match any of the definitions of Articles R 5150*ff* of said code." Its consumption and possession can therefore not be made an offense under Article L 628 of the Public Health Code.

– Mr. Claude Bauchet and the Zaiontchkovsky-Valladon spouses filed pleadings that were unsigned but then presented orally by their attorney Mr. Cabellero, in which they request, in view of Articles 34 of the Constitution and 7 of the European Convention on Human Rights that [the Court]:

- find that the combination of Articles 222-37 and 222-41 of the Penal Code, Article L 627 of the Public Health Code, and Article R 5171 of the same code in the wording resulting from the Decree of September 29, 1988 violates the principle of criminal legality because it fails to define the notion of "narcotic substance" in terms sufficiently precise to exclude the arbitrary,
- find, in view of Articles 111-2 and 111-5 of the Penal Code, that the Order of February 22, 1990 classifying DMT as a narcotic substance is illegal because it was issued by an administrative authority not designated by legislation and thus lacking jurisdiction, namely the Minister of Health.

In the alternative,

- stay the proceedings pending evaluation of the external legality of the Order of February 22, 1990 by bringing it before the Council of State as a preliminary issue to determine whether in the absence in Public Health Code Article R 5171 of any designation of the administrative authority responsible for classifying narcotics, the Minister of Public Heath could issue the Order of February 22, 1990 classifying DMT as a narcotic substance;
- find that the Order of February 22, 1990 classifying DMT as a narcotic substance is illegal due to a obvious error of discretion on the part of the Minister of Health in failing to have provided an exemption

threshold for natural plants containing infinitesimal doses of this substance;

- in the alternative, stay the proceedings pending evaluation of the internal legality of this Order of February 22, 1990 by bringing it before the Council of State as a preliminary issue to determine whether the Minister of Health made a obvious error of discretion.

And consequently,

- find that the offence prosecuted does not legally exist;
- find that there was no element of intentionality on the part of Defendants, they not knowing the "Ayahuasca" drink to be unlawful;
- set aside the judgment rendered and acquit Defendants;
- order restitution of the sealed property.

– Mrs. Anne Bouvier d'Yvoire and Mr. André Silveira-Lage filed pleadings, reiterated at the hearing by attorney Ana Atallah, in which they request that the Appeals Court find the procedure to be absolutely void because it violated the principle of strict conformity with statute *(principé de legalité)*, "Ayahuasca" not being a narcotic, and order their acquittal.

They reiterated that in its June 27, 2001 report relating to "Ayahuasca," the *Commission Nationale des Supéfiants et des Psychotropes* indicated that it "wished to have further information and opinions before deciding to

establish a potential regulation on hallucinogenic plants," the *Agence Française de Sécurité Sanitaire des Produits de Santé* (AFSSAPS) being of the opinion that "Ayahuasca" could be classified so that border controls could be performed and its use be limited.

"Ayahuasca" is not a narcotic and none of the plants from which it is made is classified as a narcotic, even though it contains DMT, because it is not a preparation of DMT in the sense of the Order of February 22, 1999 [sic] listing those substances classified as narcotics.

In the alternative, they allege that supposing it is prohibited, consumption or circulation of the decoction "Santo Daime" or "Ayahuasca" is not clearly prohibited by law. In defining narcotics in Article 222-41 of the Penal Code, lawmakers cited substances and plants. While they intended to prohibit DMT, whose presence is detected only upon in-depth analysis of the product and which is not comparable with "Ayahuasca," they did not take care to prohibit the two plants known to be the two ingredients of this decoction. It is therefore undeniable that lawmakers did not proceed in a clear fashion.

Also, in its June 17, 2003 position statement to the Court at the conclusion of the preliminary investigation *(réquisitoire définitive)*, the Prosecution could not invoke against André Silveira-Lage the Convention on Psychotropic Substances signed in Vienna on February 21, 1971 and ratified by Brazil on the grounds that it prohibits the consumption of "Ayahuasca" when that Convention does not list "Ayahuasca" but only DMT and is not directly

applicable in national law but merely obligates States that ratified it to pass laws introducing its principles into positive law.

Lastly, the United Nations International Narcotics Control Board declared on January 17, 2001 that "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca, are not under international control and, therefore, not subject to any of the articles of the 1971 Convention."

WHEREFORE, THE APPEALS COURT

I. On the defense of illegality

Mr. Claude Bauchet and the Zaiontchkovsky-Valladon spouses having in pleadings and orally raised the defense that the texts on which the prosecution was based are unlawful, namely Article L. 627 of the Public Health Code, Article R 5171 of the same Code in the wording resulting from the Decree of September 29, 1988, and the Order of February 22, 1990 classifying DMT as a narcotic substance, the Court must, pursuant to Articles 111-5 of the Penal Code and 385 of the Code of Criminal Procedure, find that this objection of illegality should have been initially presented before in the lower court before any arguments on the merits.

This defense having been raised only before the Appeals Court, it is inadmissible.

II. On the merits of the prosecution

Under the terms of the Order of July 1, 2003, the defendants were brought before the criminal court to be tried on the charge of having "in Paris, Valence, and on national territory, in 1997 and until November 1999, in any case on national territory and during a period not barred by statute of limitation, acquired, imported, possessed, offered, sold and used narcotic products, in this case Daime, a decoction containing DMT, which has been classified as a narcotic since 1990; in the case of **Claude Bauchet,** for having it brought from Brazil and for possessing it on the premises where the rituals took place; **Alexis Zaiontchkovsky** for personally undertaking to supply the Daime, his wife handling the association's financial and administrative management, they being assisted and then replaced by **Frédéric Ferrie; André Silveira-Lage,** for importing at least 100 liters of this product for the Paris group; **Anne Bouvier d'Yvoire** for being in charge of set-up of the rituals" (sic).

According to the summons, "Daime" as a decoction is a narcotic which itself contains another narcotic, DMT, classified as such in 1990.

Arguments established that the drink called "Daime" is also known by the name "Ayahuasca." In fact this term "Ayahuasca" is the one which expert Pepin used in his report to describe the product he was asked to evaluate (D15). But it should also be emphasized that "Ayahuasca" refers to a plant also called "Yagé."

In his report, the expert specifies that according to the literature, "Ayahuasca" is obtained by boiling stems of the *Banisteriopsis caapi* vine with leaves of the *Psychotria viridis* plant until a viscous liquid resembling a syrup is obtained.

This syrup contains a mixture of DMT, that is, dimethyltryptamine or N,N dimethyltryptamine from *Psychotria viridis* and beta-carbolines from *Banisteriopsis caapi.* The expert added that this mixture provokes hallucinogenic effects and a very deeply altered state of consciousness that can be of either a mystical or schizophrenic nature.

In law, judicial authorities cannot classify a product as a narcotic just because it is toxic, and it is a recognized fact that "Daime" as such does not appear in any text of our positive law as a classified narcotic toxic substance.

Furthermore, according the 2001 activity report drafted and published by the *Comité de vigilance des produits de santé* [Health Products Oversight Committee], a body of the *Agence Française de Sécurité Sanitaire des Produits de Santé* [French Agency for the Health Security of Health Products] whose report was regularly introduced during arguments, "Ayahuasca" is described as a drink obtained according to the process described by expert Pépin either by hot or cold infusion or by maceration. The author of the report specified that these decoctions would be used "for purposes of chemical submission" and he pointed out that "This plant *(Banisteriopsis caapi* according to the report, unless this is a

mistake) could be classified, which would make it possible to perform border controls and to limit its use," but the plant was the subject of continued monitoring.

In any case, the evidence in the proceedings, arguments, and texts in force as of the date of the events cited in the charges, but also to date, have established that in France, "Ayahuasca" has not been classified as a narcotic through regulation.

As to the DMT contained in the drink called "Daime" or "Ayahuasca," that is a prohibited product. Indeed in a first Order dated February 22, 1990 issued pursuant to Decree 77-41 of January 11, 1977 approving the UN Convention of 1971, the Minister of Health classified DMT as a psychotropic substance, and in a second Order dated September 10, 1992 published in the Official Journal of September 20, 1992, the Minister also prohibited the production, marketing, and use of a number of substances, including DMT or N,N-dimethyltryptamine, pursuant to the provisions of Articles L 626, L 627, R 5149, R 5171 and R 5179 of the Public Health Code as well as the Single Convention on Narcotic Drugs of 1961 and its amendments, and the 1971 Convention on Psychotropic Substances.

However, it should be reiterated that these prohibitions are limited by law, notably to "substances" and "plants" by Articles 222-41 of the Penal Code and L 627 of the (old) Health Code and to "plants, substances and toxic preparations" by L 5132-7 of the Health Code, the Vienna conventions extending these to include their bases and salts.

Article 5131-1 of the Public Health Code defines a "substance" as being "the chemical elements and their compounds as they occur naturally or as industrially produced, potentially containing any additive necessary for them to be marketable" and preparations being "mixtures or solutions composed of two or more substances."

DMT or N,N-dimethyltryptamine obtained by extraction, that is, by being separated from the compound to which it belongs in order to obtain a "substance," is, by law, a chemical product or organic material of homogenous composition, and this thus-obtained DMT or N,N-dimethyltryptamine inarguably falls under this prohibition. But "decoction," "infusion," and "maceration" operations, which are pharmaceutical techniques consisting in:

- for a decoction, "boiling in a liquid the medicinal substances to extract their soluble principles,"
- for an infusion, pouring a boiling liquid on to a substance from which one wants to extract the medicinal principles and allowing that liquid to cool, or starting with a cold liquid when the substances reside in a liquor,
- for maceration, allowing any given solid to soak in a cold, i.e. room temperature, liquid which fills with the soluble principles of that solid,

cannot yield a "substance" in the sense of the Vienna conventions and French law since they do not isolate "the chemical elements and their compounds as they naturally occur or as industrially produced," the chemical elements

and their compounds obtained by these techniques not possibly being of homogeneous composition without undergoing further operations such as a simple chromatography that can isolate and thus extract them, assuming that N,N-dimethyltryptamine and the quantities of this product in the decoction called "Daime" or "Ayahuasca" lend themselves to such.

Likewise, the court evidence and arguments have established that the DMT or N,N-dimethyltryptamine at issue in this case was not obtained by means of "preparation" – this being a pharmaceutical operation consisting in beforehand having the substances to be mixed or, in the case of a solution, to be dissolved in a liquid.

Being that a criminal judge, at trial or on appeal, can legally rule only on those facts presented in the instituting order for remand or in the summons, and cannot add to such unless the defendants expressly agree to be judged on facts not comprised in the proceedings, which was not requested of them either by the trial judges nor by the Court of Appeals,

the latter must find that the facts cited in the order for remand do not in this case constitute a judicial offence for lack of sufficient legal basis.

All of the rulings of the judgment rendered shall therefore be overturned and the defendants acquitted. The objects seized and placed under seal during this procedure shall be returned to them.

Since this decision comprises no civil rulings, the appeal formulated against such by André Silveira-Lage does not apply.

FOR THESE REASONS and those of the lower court that do not conflict,

THE COURT OF APPEALS

Ruling publicly with all parties present,

Grants the primary appeals of Mrs. Anne Bouvier d'Yvoire, Mr. Claude Bauchet, Mr. Alexis Zaiontchkovsky, [and] Mr. Frédéric Ferrie of the criminal rulings and that of Mr. André Silveria-Lage [sic] on the civil and criminal rulings of the judgment entered,

Grants the cross-appeal of the Office of the Public Prosecutor against Mrs. Anne Bouvier d'Yvoire, Mr. Claude Bauchet, Mr. Alexis Zaiontchkovsky, Mr. Frédéric Ferrie and Mr. André Silveria-Lage [sic],

Grants the primary appeal of the Office of the Public Prosecutor against Mr. André Silveira-Lage, Mrs. Anne Bouvier d'Yvoire, Mr. Claude Bauchet, Mr. Alexis Zaiontchkovsky, Mrs. Corinne Valladon Zaiontchkovsky and Mr. Frédéric Ferrie,

Declares inadmissible, pursuant to Articles 111-5 of the Penal Code and 385 of the Code of Criminal Procedure, the objection of illegality raised at the Court of Appeals hearing by Mr. Claude Bauchet and the Zaiontchkovsky-Valladon spouses;

Sets aside, for lack of sufficient legal basis, all of the rulings of the judgment entered,

Acquits the defendants,

Orders restitution of property under seal.

[signature] [signature]

PRESIDING JUDGE CLERK

[stamp:]

CERTIFIED TRUE COPY
For Chief Clerk
[signature]

COURT OF
APPEALS
OF PARIS

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AFFIDAVIT BY TRANSLATOR

I, the undersigned Julie E. Johnson, am an accredited translator professionally engaged in translating legal documents from the French to the English language, and a Judicial Council of California Registered Interpreter for French, No. 700020.

I hereby certify that the following English translation is a true and correct translation of the attached French-language decision by the Paris Court of Appeals, to the best of my knowledge and belief.

/s/ Julie E. Johnson March 1, 2005
Julie E. Johnson Date